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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 698

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38
and
ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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APPENDIX A.

STATUTES INVOLVED.

Title 42, U.S.C., Section 2000e.

(Title VII of Civil Rights Act of 1964.)

SUBCHAPTER VI.—EQUAL EMPLOYMENT OPPORTUNITIES.

§ 2000e. Definitions.

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer or (2) the number of its members (or where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 701, (B) seventy-five or more during the second year after such date or fifty or

more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employees engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any

place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act. (Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662.)

§ 2000e—2. Unlawful employment practices—Employer practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs

to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel for particular religion.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or re-training programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

Preferential treatment not to be granted on account of existing number or percentage imbalance.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255.

§ 2000e—6. Civil actions by the Attorney General—Complaint.

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Jurisdiction; three-judge district court for cases of general public importance; hearing, determination, expedition of action, review by Supreme Court; single-judge district court; hearing, determination, expedition of action.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief

judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. (Pub.L. 88—352, Title VII, § 707, July 2, 1964, 78 Stat. 261.)

APPENDIX B.

OPINION OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

Civil Action No. C 67-575.

UNITED STATES OF AMERICA by RAMSEY CLARK,
Attorney General,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38,
ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendants.

MEMORANDUM.

GREEN, *J.*:

On August 8, 1967 the United States instituted this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e through 2000e-15, against the International Brotherhood of Electrical Workers, Local No. 38 (hereinafter referred to as Local 38) and its Electrical Joint Apprenticeship and Training Committee (hereinafter referred to as EJAC). The complaint alleges that the said defendants have engaged and are engaging in a pattern and practice of resistance to the full enjoyment by Negroes of their rights to equal employment opportunities.

As to the defendant Local 38, the complaint alleges discrimination in three major areas:

1) *Journeyman Membership*

It is alleged that Local 38 has refused to admit Negroes to journeyman membership in the union.

2) *Referral for Employment*

It is alleged that Local 38 has refused to refer Negroes for employment on the same basis as white applicants and has given discriminatory priority in work referrals to members of Local 38.

3) *Contractor Affiliation*

It is alleged that Local 38 has refused to enter into collective bargaining agreements with Negro electrical contractors on the same terms and conditions offered to white electrical contractors.

As to the defendant EJAC the complaint alleges:

That EJAC has pursued a policy and practice of discrimination against Negro applicants for admission to the union's apprenticeship program because of their race.

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), declares that it shall be an unlawful employment practice for a labor organization:

(1) to exclude . . . or otherwise to discriminate against, any individual because of his race . . .

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race . . .

The Act further declares, 42 U.S.C. § 2000e-2(d), that it shall be an unlawful employment practice for any joint labor-management committee controlling apprenticeship:

> . . . to discriminate against any individual because of his race . . . in admission to or employment in, any program established to provide apprenticeship.

The authority of the United States to bring suit for alleged violations of the Act is derived from Section 707(a) thereof, 42 U.S.C. § 2000e-6(a):

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of rights herein described, the Attorney General may bring a civil action in the appropriate district court . . .

Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g) provides that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . .

It would thus appear that in order to prevail in this action the United States has the burden of establishing that the defendants have intentionally engaged in, or are engaging in, actions as alleged in the complaint constituting a pattern or practice of racial discrimination.

As of this date, a substantial body of authority construing the provisions of the Civil Rights Act of 1964, here

under consideration, has not yet developed. There are, however, certain principles which do appear from the decided cases and the legislative history of the Act. While the United States has cited many cases involving discrimination in voting rights, this Court believes that, by reason of the distinctions in fact and law between such cases and the one at bar, the principles enunciated in the voting rights cases are relevant hereto only at their broadest general levels and cannot be determinative of precise factual issues herein.

The primary proposition agreed upon by the courts construing the Civil Rights Act, looking to the legislative history for guidance, is that the Act is prospective and only reaches discriminatory practices occurring after its effective date of July 2, 1965. *Griggs v. Duke Power Co.*, No. C-210-G-66, Middle District N. Carolina, 9/30/68; *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (D.C. S.D. Ohio, 1968); *United States v. Local 189, United Papermakers and Paperworkers*, 282 F. Supp. 39 (D.C. E.D. La., 1968); *United States v. Sheet Metal Workers*, 280 F. Supp. 719 (D.C. E.D. Mo., 1968); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (D.C. E.D. Va., 1968). It further appears from these same authorities that pre-Act practices may be considered on the question of intent in determining whether post-Act practices are discriminatory.

Another point which appears to be agreed upon by the decisions in which it has been considered, is that the simple absence of Negroes from a given group is not conclusive evidence of discrimination. *Dobbins v. Local 212, supra*, at 445-446; *United States v. Sheet Metal Workers, supra*, at p. 728. On the other hand, such a statistical demonstration coupled with a showing of specific acts of discrimination may be sufficient to make out a prima facie

case. Thus, the plaintiff's argument that a presumption of discrimination arises from the fact that there are substantial numbers of qualified Negro electricians (a proposition supported by scant proof) and Negroes of apprenticeship age interested in becoming electricians (a proposition supported by no proof) in the Cleveland area is not supported by the law. While common sense certainly would lead one to assume that a relatively total absence of Negroes from a trade union was not a mere coincidence, such fact is not sufficient to make out a case for relief under the Civil Rights Act without a further showing of actual discriminatory practices.

With regard to the matter of proof of acts of discrimination, an alleged pattern or practice of discrimination cannot be based on isolated acts of discrimination. *United States v. Sheet Metal Workers, supra*, at p. 728. That question must be resolved on the totality of the alleged discriminatory practices of the defendant.

Although there is limited authority construing Title VII of the Civil Rights Act, the majority of such decisions recognize certain limitations as to the relief which is appropriate thereunder. While it may be premature to discuss relief at this point, it is relevant in that it reflects on the scope of the Act and the Congressional intent behind it. The plaintiff urges that where discrimination is established negative relief is not sufficient and affirmative action is required citing, inter alia, the *Quarles* decision the statement that:

> The act does not prohibit present differences that are the result of attempts to discriminate before the effective date of the act. 279 F. Supp. 505, 518.

As to that statement, however, another court has taken the position that:

> If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise. *Griggs v. Duke Power Co.*, *supra*, p. 2.

It appears to this Court, from a survey of prior decisions, that while the courts have recognized the power under the Act to remedy effects of past discrimination, rather than simply to enjoin future discrimination, that power is subject to a definite restriction arising from the terms of the Act itself, 42 U.S.C. § 2000e-2(j).

Section 2000e-2(j), in pertinent part, provides that:

> Nothing contained in this subchapter shall be interpreted to require any . . . labor organization, or joint labor-management committee . . . , to grant preferential treatment to any individual or to any group because of the race . . . color . . . of such individual or group on account of any imbalance which may exist with respect to the total number or percentage of persons of any race, color . . . referred or classified for employment by any . . . labor organization . . . or admitted to . . . any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color . . . in any community . . . , or other areas, or in the available work force in any community . . . or other area.

In construing Section 2000-e(j) the court stated in the *Dobbins* case:

> It is the Government's position that Title VII, upon becoming effective, required a union . . . to take affirmative action to relieve the present-day result of pre-Act discrimination. Stated otherwise, the Government claims that discriminatory actions in the past have a continuing direct impact on individual electricians, who, refused union membership or work in the past are reluctant to subject themselves to similar

treatment now. Our conclusion is to the contrary, based on 2000e-2(j).

> In our view affirmative post-Act action, directed toward a group to correct pre-Act discrimination against that group constitutes the granting of preferential treatment to that group and on that subject Congress has specifically stated that Title VII shall not be construed so as to require a labor union to grant preferential treatment to any group based on race or color. 292 F. Supp. 413, 444.

Accord: *United States v. H. K. Porter Co.*, 70 LRRM 2131, 2149 (D.C. N.D. Ala., 1968); *United States v. Sheet Metal Workers*, *supra*, at 729-730. It is this Court's conclusion that while some affirmative relief may be appropriate under the Act, it must be carefully delineated so as to avoid transgressing the boundaries established by Section 2000e-2(j), and that the plaintiff's theory of law does not adhere to that fine line.

Finally, while Title VII of the Civil Rights Act affords a valuable tool in moving forward in the creation of an integrated society and overcoming social ills whose presence feeds the fires of discontent, its provisions should not be considered as a panacea for the effects of lifetimes of deprivation nor applied in a vindictive manner against those who have inherited problems originating in another era. Neither the Attorney General nor the courts can overlook such considerations while seeking to implement the important and necessary objectives of the Act. A *caveat* in this regard is set forth in the *Sheet Metal Workers* opinion, wherein it was stated:

> The Civil Rights Act of 1964 was not intended to penalize unions or others for their sins prior to the effective date of the Act. It is prospective only. Neither was it passed to destroy seniority rights in unions or in business. The Act specifically forbids a

union or a business from giving preferential treatment to Negroes to correct an existing imbalance of whites. In order to be a violation of this Act, there must be an intentional pattern and practice of discrimination and not an isolated instance of discrimination. 280 F. Supp. 719, 730.

With this prefatory consideration of the dominant legal propositions involved in this action, the Court may now consider the merits of the Government's allegations. These questions will be taken up by the general categories previously noted herein, but not in the order of presentation set forth in plaintiff's complaint and brief.

Contractor Affiliation

The Government contends that Local 38 has discriminated, and continues to discriminate, against Negro contractors in its policies and practices with respect to union affiliation. There is no doubt that union affiliation is beneficial to an electrical contractor, and that if discrimination were practiced in this regard it would call for remedial action.

While conceding that three Negro contractors were affiliated before the effective date of the Civil Rights Act of 1964, the plaintiff contends that their relations with the union were so tenuous that Local 38 officials cannot say how many employees they have now or had at the time they affiliated. That argument is of no merit, for there is no evidence that the union officials maintained such data regarding white contractors.

Similarly, the recitation of the relative numbers and percentages of Negro and white union and non-union contractors is not conclusive without a showing of discrimination.

The plaintiff's evidence on contractor affiliation was offered through Paul Tiber, John Jackson, Robert Richardson, C. J. Callahan, Sol Sloan, Eddie Reese and Alvin Lewis. Messrs. Tiber, Sloan and Lewis are white, and Messrs. Jackson, Richardson, Reese and Callahan are Negro.

The testimony of Mr. Sloan, who was an electrical contractor during the years 1958 through 1962, is relied upon by plaintiff as demonstrating that he was denied union affiliation because he had only one employee, who was Negro. Plaintiff's exhibit 4 reflects that Mr. Sloan made many unsuccessful attempts to obtain union affiliation. That same exhibit, however, reflects the rejection of seven other applicants during the same period of time, three of whom were IBEW members, and the acceptance of only one application for affiliation. Presumably, the seven other rejected applicants were white and there is no evidence that they employed Negroes. On these facts, the Court does not believe that it can be said that the plaintiff has proved racial discrimination in the rejection of Mr. Sloan by Local 38.

The testimony of Mr. Jackson is not only pre-Act, but virtually irrelevant to this action. His statement that he was refused affiliation prior to 1958 places that occurrence too remote in time to be considered herein. His other testimony pertained to an incident that occurred in March, 1965. He testified that at that time he was working on a project on a Saturday morning, when he was approached by two men who said they were from the union and working on a building next door, but denied that they were Local 38 business agents. He stated that they told him he could not continue on his job because the union was working next door and he was not allowed to work next to union men. He replied that if he was

not allowed to work he would like to join the union, asked the two men to vouch for him before the union, and gave the men his card. He stated that the men promised to follow through, but he was never contacted by the union. However, Mr. Jackson testified that following that visit he continued on to completion with his job without any further interference. This testimony does not support the Government's contention that Mr. Jackson was given a "run-around" in an attempt to obtain union affiliation.

The plaintiff further contends that Local 38 has discriminated in failing to advise Negro contractors of the opportunity to become affiliated. Mr. Reese testified that in 1964 he came to the union seeking work, but was rejected, being advised that he was considered to be a contractor at the time. Mr. Richardson testified that in the spring of 1965 he was required to abandon a job because of his non-union status. Each of these parties stated that they were not offered the opportunity to obtain union affiliation. The deficiency in this pre-Act evidence is that there is no proof that the union officials offered affiliation to white contractors similarly situated.

Plaintiff's post-Act evidence is derived from Mr. Richardson and Mr. Callahan.

Mr. Richardson first appeared before the Local 38 Executive Board in 1960 seeking affiliation, and was rejected. In early 1968 he was on a project at St. John's College in Cleveland when a Local 38 business agent left word for him to call. He thereafter met with the Local 38 Business Manager, two other union representatives, the President of the prime contractor for the project, and two representatives of the Catholic Diocese. The matter of his affiliating with Local 38 was discussed, but he made no decision. Mr. Richardson eventually did affiliate with Local 38 in August, 1968, following several other meetings

with Local 38's business manager. Although plaintiff suggests that this delay was attributable to the union and bears racial overtones, it is the Court's opinion that the record clearly establishes that Mr. Richardson was bargaining with the union during the interim regarding certain conditions of affiliation. Mr. Richardson lost one of the bargaining points, the possibility of not paying some of his men union scale, and won the other, his employees continuing to work without taking any IBEW union affiliation. Based on Mr. Richardson's entire testimony the Court finds no discriminatory action towards him after July 2, 1965.

The testimony of Mr. Callahan was offered to establish that Local 38 imposed different requirements for affiliation on Negroes than on whites.

He originally went before the Local 38 Executive Board in 1966. At that time he made no formal application for affiliation, but was advised that if he wished to do so he would have to exhibit two letters of credit from suppliers and financial statements of his business and post a bond guaranteeing his ability to meet his payrolls. As to the amount of the bond, he stated that he was "not very clear on |it|, but I believe it was in the neighborhood of $15,000." Mr. Callahan's statement regarding his 1966 appearance was that:

> I didn't make an application at that time. I went there seeking information to find out what it would take to become a union contractor.

He made no effort to follow up on that initial visit. In 1968, however, he was offered a job that required him to assure the prime contractor that his non-union status would not create labor problems. He thereupon went to the union hall and spoke with the Local 38 Business Manager. At that meeting an appointment was made for

Mr. Callahan to appear before the Executive Board in two weeks, at which meeting he was to bring in a financial statement and two letters of credit. He was also advised that he could begin his job without any fear of problems with the union, which he did. Mr. Callahan appeared before the Executive Board with the requested documents and was advised that if he could post a $6,000 bond he would be accepted as an affiliated contractor, subject to a general membership vote for approval. He stated that he could post such a bond, and shortly thereafter was notified of his acceptance.

Plaintiff's Exhibit 31-C, being an excerpt from answers to interrogatories, lists the names of all persons who affiliated as contractors with Local 38 after October 1, 1967. Mr. Callahan and three whites are named. As to the standards imposed for affiliation it is stated:

> (1) For all contractors who signed the contract after May 1, 1968: payment of Wages and Welfare Bond $1,000 per man up to ten men or $10,000.
>
> (2) For all others: $6,000 payroll bond, Workmen's Compensation proof, bank statement regarding finances and letter of credentials from wholesale houses, city license.

The plaintiff offered no evidence that this interrogatory response was inaccurate as it pertained to the white contractors named therein. The plaintiff did show that Mr. Tiber and Mr. Lewis were granted pre-Act affiliation without being required to post any bond. That evidence is not probative of the issue of whether discriminatory standards were imposed on Mr. Callahan in 1968. It thus appears that when Mr. Callahan affiliated the standards he was required to meet were precisely the same as those for white contractors.

The plaintiff contends, however, that the alleged

$15,000 bond requested in 1966 was a discriminatory device designed to insure that he would not make a formal application. In view of Mr. Callahan's admittedly hazy recollection on the question of the amount of the bond requested in 1966, and the fact that he thereafter did make a formal application for affiliation when his best interests were served by such action, the Court cannot accept that evidence as being proof of a pattern and practice of discrimination.

Finally, the Government contends that the fact that the decision on contractor affiliation is subject to the discretion of a vote of the Executive Board and general membership, even though there are specified standards for affiliation, is inherently discriminatory. While it is true that such a vote has the potential to be used as a discriminatory device, there is no evidence that it has been used as such since July 2, 1965. Absent such proof the inherent vice provides no basis for judicial intervention.

Although Local 38 may have discouraged Negro contractors from affiliating prior to July 2, 1965, it is the Court's conclusion that the plaintiff has failed to prove that Local 38 engaged in a pattern and practice of racial discrimination with regard to contractor affiliation after the effective date of the Civil Rights Act of 1964.

Journeyman Membership

The plaintiff contends that Local 38 has discriminated in its policies with respect to admission of Negroes to journeyman membership status.

There are two avenues of securing journeyman membership in Local 38. The first is through apprenticeship. An applicant selected for apprenticeship becomes a member of Local 38 after being an apprentice for six months, and upon satisfactory completion of his four year

apprenticeship becomes a journeyman member. The second route to membership is through the referral system, a subject that will be considered in detail under its own heading. Basically speaking, however, an electrician who has been working for a given number of years under the jurisdiction of Local 38 through its referral system may take a journeyman wireman's exam to qualify for Group One rating in the referral system. If he successfully achieves Group One status he is entitled to apply for membership in the union, subject to acceptance by a vote of the general membership.

At the outset of its argument on this point the Government cites certain statistics as to the racial composition of Local 38's membership over a period of years. That table is as follows:

Date	*White*	*Negro*
Jan. 1, 1957	1049	0
Jan. 1, 1960	1101	3
Jan. 1, 1965	1292	2
Jan. 1, 1967	1316	2
Oct. 1, 1967	1329	3
Sept. 25, 1968	1331	4

These statistics without further proof will not support a claim of discrimination under the Act, although standing alone they would certainly cause a reasonable man to question whether the union's admission policies had been equitable.

The plaintiff offered evidence which, although subject to attack by the defense as to its credibility, would be sufficient to support a finding that Negroes had sought direct membership in Local 38, both pre-Act and post-Act, and their requests were denied.

Local 38's refusal to accept those Negro applicants for direct membership does not support a finding of racial

discrimination. All the evidence in this record, both testimonial and documentary, positively establishes that, with but one exception, in 1957 when 3 Negroes were granted direct membership,[1] Local 38 has not, during any relevant period, granted direct membership to anyone and has never granted direct membership to any white applicants. There is documentary proof that white members of other IBEW locals who have requested to be taken directly into Local 38 have been refused. Therefore, the refusal to grant such privileges to Negroes cannot, standing alone, be considered as a violation of Title VII.

The next aspects of the plaintiff's argument on this subject carry over to the two remaining areas of controversy, the referral and apprenticeship systems.

The Government contends that as the union has practiced discrimination in the past administration of its apprenticeship classes that all Negroes over apprenticeship age are forever excluded from membership and that continued refusal to directly admit Negroes over apprenticeship age violates Section 703(c)(1) of the Act, 42 U.S.C. § 2000e-2(c). This argument is not correct, for it ignores the realities of the possibility of Negroes over apprenticeship age achieving membership through the referral system, see p. 28 & 68, infra.

On the subject of the possibility of achieving union membership through the referral system, the Government contends that this alternative method is meaningless, in that the required test has not been given since 1959. In that year 24 white men were tested for Group One qualification, and all failed.

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[1] The union minutes relative to the admission of the 3 Negroes stated that such action was being taken by reason of a "mandate" issued by the International Union, its parent body, and the A.F.L.

While the fact that there has been no such test for several years is true, the failure to administer such a test cannot be considered discriminatory. It was not until the summer of 1967 that any substantial numbers of Negroes began to work under the jurisdiction of Local 38 through the referral system. The record reflects that at that time Mr. Richard Acton, the newly elected Business Manager of Local 38, had discussions with Mr. Richardson and also with individual Negroes applying for work indicating to them that there was the possibility of achieving union membership through the referral system. Mr. Acton further testified that he also discussed with Local 38's newly elected President, Mr. John G. Steele, the giving of the required test, and they determined to do so at a time when there were enough Negroes qualified to take the test under the existing standards so as to make it meaningful as a practical matter. Thereafter, the union leadership became so tied up in this litigation that they were unable to implement their determination to proceed with such a test. When the Government became apprised of the fact that Local 38 intended to proceed with the test after this trial had been concluded, a motion was filed by plaintiff to restrain the union from going forward, which motion was granted with leave to the union to reapply to the Court for permission to give the test. Such a request is now pending before the Court.

It would thus appear that the initial failure to administer the test for Group One status subsequent to July 2, 1965 could not have affected the employment opportunities of Negroes and that the fact that the test has not yet been given is not racially motivated. While the fact that there were not sufficient Negroes working under the auspices of Local 38 to make the granting of the examination meaningful may itself involve racial discrimination,

that is not the question here under consideration and it will be dealt with in considering the referral system.

It is therefore this Court's conclusion that the plaintiff has failed to prove a pattern and practice of racial discrimination on the part of Local 38 by its refusal to directly admit Negroes to journeyman membership or its failure to date to administer the test for Group One which will open the door for an application to journeyman membership.

Were it not for the fact that the defendant union is pressing to go forward with the Group One test, the Court would issue an order requiring it to do so, for a continuing failure to administer such test would constitute a discriminatory practice remediable under Title VII. At this juncture, no such order is necessary.

In its proposals for relief under the heading of journeyman membership the plaintiff suggested certain variations in the collective bargaining procedure relative to the Group One test and the right of persons passing the exam to apply for journeyman membership in Local 38. Such alternative procedures constituted the entire relief sought by plaintiff in this area. The Court will retain jurisdiction over the pending motion by defendant Local 38 relative to the giving of the journeyman wireman's exam, and the Government's proposals as to the appropriate conditions to be applied thereto will be considered and resolved within the framework of that motion.

Referral for Employment

Since about 1958 Local 38 has, pursuant to its collective bargaining agreement with the contractors, conducted a referral system. A contractor who needs an electrician contacts the union hall and the union is then to refer an electrician who has applied for employment.

In order to become a part of the referral system an electrician must appear in person at the union hall and fill out a referral application showing his job qualification. The referral system is divided into four priority groups, and the applicant is classified in one of the groups according to his qualifications. Under the collective bargaining agreement Local 38 is to maintain an out-of-work list of all referral applicants for whom work is not available, and when there is a job available the men are to be referred from such list by group priority, or by date of application within groups. However, an applicant for referral must reconfirm his availability for employment after sixty days in order to retain his priority.

Prior to May 1, 1968 the requirements for placement in the four referral groups were as follows:

Group I. Four years experience in the trade; pass an IBEW journeyman wireman's exam; one year's residence within the jurisdiction of Local 38; and four years experience under the collective bargaining agreement.

Group II. Four years experience in the trade; pass an IBEW journeyman wireman's exam.[1]

Group III. Four years experience in the trade; one year's residence within the jurisdiction of Local 38; four years experience under the collective bargaining agreement.

Group IV. Two years experience in the trade.

On May 1, 1968 the standards for Groups I, III and IV were revised so as to broaden them. For Group I the work experience requirement was lowered to one year in the last four years under the collective bargaining agreement. For Group III the work experience requirement

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[1] Group II is a special category designed to accommodate members of other IBEW locals who are working temporarily within the geographic jurisdiction of Local 38.

was reduced to two years in the trade and six months in the last three years under the agreement. Group IV was revised to require only one year experience in the trade.

By virtue of the requirements of the apprenticeship program, all persons completing the program and thereby becoming members of Local 38 automatically satisfy the requirements of Group I. Although Group I classification is also achievable by passing a journeyman wireman's exam, Group I presently consists of Local 38 members only, in that no one passed the one such exam given in 1959.

There was, prior to July 2, 1965, a work group known as temporary 2-B helpers. This group, unlike the other referral groups, was not established under the collective bargaining agreement. It consisted of men with no prior electrical experience and essentially was composed of sons or close relatives of union members. The 2-B helpers were generally employed during the summer, although there is evidence that some 2-B workers were employed at other times. The 2-B classification was discontinued prior to the effective date of the Civil Rights Act. There is a conflict in the evidence as to the reason for the discontinuance of the 2-B category. The Government contends that it was terminated for racial reasons, and there is some testimony to support that view. The defense witnesses testified that 2-B was dropped because it was no longer serving the purpose for which it had been created.

Although the 2-B category was formally discontinued as of June 1, 1965 plaintiff introduced documentary evidence indicating that thereafter Local 38 continued to refer men for work who did not have the requisite experience. Exhibits were introduced containing referrals of both white members of other unions and white non-union members whose referral applications, it is contended, did

not reflect one year's experience as electricians. The Court has examined those exhibits, and finds that contained therein are referrals of unqualified whites, although not all the documentation therein supports the plaintiff's contention.

William Hirsch, who was a union business agent up to July, 1967, admitted that if there was a demand for help that he could not meet with qualified electricians he would refer unexperienced persons. It appears that men so referred would be used to perform manual labor jobs.

Mr. Richard Acton testified that after he became Business Manager in 1967 he did not make any original referrals of inexperienced persons and adopted a requirement that applicants for referral have written proof of prior work experience to avoid anyone falsifying their qualifications in order to obtain referral, as this record shows had happened in the past. There is no evidence in the record that any unqualified referral applicant has secured employment since July, 1967.

This matter of the referral of unqualified whites has dual relevance to this entire question of the referral system.

As a part of the relief requested hereunder the plaintiff seeks an order requiring Local 38 to adopt procedures for the referral of persons with less than one year's prior experience as an electrician, and until such procedures are adopted to refer all Negro applicants over apprenticeship age with less than a year's experience in Group IV. This request will be considered hereinafter.

Plaintiff also relies on this evidence as proof of discrimination in the operation of the referral system, contending that at the time these white applicants were being referred for employment qualified Negro electricians were being refused the opportunity to work through the referral system.

There is evidence in the record to indicate that Local 38 had engaged in discrimination in the administration of the referral system. The record further indicates, however, that any discriminatory practices which existed in this area came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 as a result of an election held in June, 1967. The two principal officials who assumed office were Richard Acton as Business Manager and John Gilbert Steele as President. Mr. Acton replaced all the incumbent business agents, who work in the administration of the referral system, with his own appointees.

Plaintiff has alleged in its brief and has suggested throughout the Government's presentation that any change in policy by the defendant union is a direct outgrowth of the pendency of this litigation. The Government has noted that Mr Acton and Mr. Steele, along with other persons who ran for union office with them on various slates, had previously held union positions. The record indicates, however, that the prior representation which these men had in the union's elected bodies was not such as to enable them to have a strong hand in formulating union policy. The Court was able to observe Mr. Acton and Mr. Steele as witnesses in this trial and evaluate their credibility. It is the Court's conclusion that their positive actions in moving this union forward in the field of racial integration reflect their own personal convictions and do not represent matters of expediency to develop a record for the courts. While it may be true that the Government's investigation of Local 38 was a motivating force, and the filing of this action coming, as it did, virtually on the eve of their election brought home to the new officers a full realization of the depth of the problem confronting the union, that does not require the conclusion that the officers' response thereto was not in good faith.

The relevant statistics are that Local 38 referred no Negro journeyman electricians between January 1, 1962 and July 2, 1965 and referred two Negroes between July 2, 1965 and May 31, 1967. One of the Negroes referred during the 1965-1967 period was a journeyman member of Local 38, Roger Freeman, and the circumstances of his becoming a member of the union will be discussed in considering the question of apprenticeship. The other party was referred in November, 1965 to work on the Federal Office Building being constructed in Cleveland, which project had a job requirement that minority groups be represented in the trade.

As documentary evidence of discrimination the plaintiff introduced into evidence a file secured from the union records marked "Not Qualified." Contained in that file were referral applications of six Negroes: Theodore Pinkston, Dempsey Pugh, George Suddeth, Eddie Reese, William Edwards and Herbert Massey, bearing dates ranging from July, 1960 to June, 1967. The said applications, on their faces, would indicate that the applicants were qualified for referral at the time they requested employment. This would indicate that the applicants were discriminated against. The file also contained referral applications of four other persons not identified as Negro, thus raising at least a question as to whether the "Not Qualified" file represented racial discrimination.

While admitting that four of the six Negroes whose referral applications were in the "Not Qualified" file reapplied for referral after July, 1967 and obtained employment thereby, the Government criticizes the union for not contacting these men when the applications first came to the attention of the new union officers. If the Government's "affirmative action" theory represented controlling law there would be substance to that argument; as it does

not, the union's passive attitude towards the "Not Qualified" file is no evidence of present, as distinguished from past, discrimination.

Messrs. Pinkston, Reese, Edwards and Massey appeared as plaintiff's witnesses at the trial.

Mr. Pinkston's testimony was all pre-Act. He testified that he was among a group of Negroes who took an exam for journeyman membership in 1957,[3] but that he was not admitted to membership in the union. He further testified that in 1960 and 1963 he visited the union hall seeking membership. On each of those occasions he did fill out a referral application and was advised that the union had members out of work at the time.

The testimony of Mr. Reese, Mr. Massey and Mr. Edwards is post-Act, although Mr. Reese did testify regarding three pre-Act rejections by the union.

The testimony of Mr. Reese and Mr. Edwards was comparable, in that each of these men related appearing at the union hall in June, 1967, just before the union election, seeking employment. Each stated that he was told that no work was then available, but that he should check back in July. The July date was after the officers who would be selected in the up-coming election were to be installed.

Mr. Massey went to the union hall in late 1965 seeking employment, and was told that none was available, and that there was no need for him to leave a referral application. In 1966 he again returned to the hall, filled out a referral application, and was told the union had no work available. While the defense attempted to justify this latter refusal on the basis that Mr. Massey was then

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[3] That exam was given to approximately 6 Negro electricians as a qualifying test prior to the acceptance of the 3 Negroes into the Union in 1957, as previously set forth herein.

employed and the union had a policy of only referring men who were out of work; the record does not support that contention.

It appears from the record that at the time these Negro journeyman electricians applied for referral there was full employment in the electrical industry in the geographic jurisdiction of Local 38, and even a shortage of help during certain of the relevant periods. It therefore follows that the failure of Local 38 to refer the men for employment was discriminatory.

The remaining question is whether such discrimination was part of a pattern and practice to deny equal employment opportunities to Negroes, or represented isolated acts of discrimination. Having considered the entire record, the Court has concluded that the acts of the union officials in control at that time reflected a racially discriminatory policy with regard to referral for employment.

The next issue for the Court's consideration is the relief necessary and appropriate, to remedy the union's discriminatory practices which continued until July, 1967.

The Government contends that the record supports the conclusion that there are between 50 and 100 qualified Negro electricians in the Cleveland area, and a substantial number of these have been denied, and are being denied, the opportunity to secure employment through Local 38. This contention is based on an estimate given at trial by one of plaintiff's witnesses. As a part of the proposed relief on this subject, the Government suggests a general waiver of the requirements of experience under the collective bargaining agreement and taking of a journeyman wireman's exam as to Negroes, and classification in the referral system based on work experience alone. It is the Government's contention that only such action can overcome the effects of past discrimination.

If the record lent substantial support to the argument that the union's past actions have resulted in a large number of Negroes being prejudiced as far as their present opportunities for employment are concerned, the Court would have to give serious consideration to granting relief in the manner suggested by the Government.

Paul Tiber, a white electrical contractor who appeared as a plaintiff's witness, testified that in the spring of 1968 he needed minority representation on his crew to satisfy the requirements for proceeding with a federally funded project. He requested Local 38 to refer to him a Negro electrician, but there was none available, although by that time the union was freely referring Negroes. He then contacted the Ohio State Employment Service and several of the well known civil rights groups attempting to find a qualified Negro electrician. He met with no success until a civil rights organization, known as the Workers Defense League, referred a journeyman electrician to him.[1]

At the present time there are about 44 Negroes working on referral from Local 38. There is no evidence that as of this time any qualified Negro electrician has applied for referral and has been unable to secure employment.

These considerations weigh heavily against the Government's theory that there are presently many qualified Negro electricians being denied employment opportunities. As was said in the Local 212 decision:

> To make out a *prima facie* case for class purposes, as distinguished from individual purposes, the plaintiff has the burden of showing the existence of a significant number of members of the group possessing the basic skill in the particular trade involved.

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[1] Mr. Tiber testified that thereafter he had to discharge the man as incompetent. That testimony is unrebutted.

> The plaintiffs have shown the existence of some members of the class who are skilled and who have applied and as to those it has established a case. We cannot assume and do not assume from that that there are other members of the group similarly qualified. 292 F. Supp. 413, 445-446.

The Court has intentionally cut off the discussion of the union's relationships with Negro referral applicants as of June, 1967 in order to illustrate the change in attitude accompanying the new leadership. That consideration is relevant to the issue of appropriate relief. The Court will now review the evidence on this subject subsequent to July 12, 1967, the date the new officers were installed.

Mr. Reese, Mr. Edwards and Mr. Massey each returned to Local 38 for referral in or after July, 1967, Mr. Reese and Mr. Massey directly and Mr. Edwards being sent to the union by a prospective employer he had contacted in response to a newspaper advertisement. In each instance, Mr. Acton, upon being advised that a prior referral application was on file, secured the earlier referral application and each of the men was immediately referred for employment. Mr. Massey was referred for employment a second time in 1967, on the same day he appeared at the union hall seeking work after having been discharged from his prior job.

Elmer Thompson, a Negro electrician, came to Local 38 in August, 1967. His visit there was only for the purpose of seeking membership. A business agent advised him he was not eligible for membership, and asked him if he wanted a job. Mr. Thompson replied that he was employed and did not want a job, only membership. Nevertheless, the business agent had him fill out a referral application, although he did state there was no work immediately available. In 1968 Mr. Thompson applied for

a job with a union contractor and was told by the contractor that he would have to be referred through the union. He thereafter returned to Local 38, and was referred out for employment.

Willie E. Crook, a Negro journeyman electrician, was referred for employment by Local 38 in April, 1968. Although his recollection of the events leading to his referral indicates about a three-month lapse between his initial contact with the union and his referral, documentary evidence in the record indicates that the actual lapse of time was only about two weeks. On Mr. Crook's first visit to the union hall he had no written proof of his work experience. He was questioned about his qualifications, was told that he could be employed although there was no work then available, and that he should secure the necessary proof of work experience and return to the union hall. Mr. Crook took no steps to secure the requested proof, and did not return to the union hall. He was thereafter called by a union representative and was told that there was work available if he was still interested. Following that initiative by the union, Mr. Crook secured the necessary papers for presentation to the union and was immediately referred to a union contractor.

The two remaining fact witnesses whose testimony bears on the question of referral were Herman C. Tellis and John H. Williams, Jr., both Negro electricians. Their testimony is relied upon by plaintiff as the basis for an argument that Local 38 misinformed Negro applicants about the requirements and procedures for referral.

Mr. Tellis testified that in September, 1967 Mr. Massey, who was then working through the referral system, suggested to him that if he joined Local 1377 of the IBEW he might be able to obtain employment through Local 38. Local 1377 is a maintenance electricians' union for this

geographic area. Mr. Tellis stated that he spoke to representatives of both Local 1377 and Local 38 and was told that in order to be referred he had to have proof of four years experience as an electrician. He was, however, unable to identify the person from Local 38 he claimed gave him such information. At that time the minimum requirement for referral was two years experience. Although Mr. Tellis could have proved two years work experience, he had previously worked out of the City of Cleveland, and he had to go to Chattanooga, Tennessee, to get the proof of four years experience. Consequently, there was some delay in his getting a letter showing four years prior experience, but after securing the same he was referred for employment by Local 38.

Mr. Williams testified that in late 1967 he visited the Local 1377 offices because he heard that they were hiring electricians. He stated that he was told that he needed proof of four years work experience, secured such proof, and was sent over to Local 38 which referred him directly to a job. There was no delay in Mr. Williams' securing employment, in that he did not have proof of any work experience when he first went to Local 1377. Mr. Williams did not testify that anyone from Local 38 told him that four years experience was needed for referral.

The defense witnesses testified that no one from Local 38 had been advising Negro applicants that four years, rather than two years, work experience were required for referral, and in view of the fact that Mr. Tellis could not identify the party he allegedly spoke to at Local 38, the defendant was unable to specifically answer that charge further.

It is this Court's opinion that this evidence is insufficient to warrant a finding of a pattern or practice of discrimination based thereon. Mr. Tellis' testimony re-

garding his conversations with the unidentified Local 38 representative will not support such a finding. Assuming that the officers of Local 1377 did convey such information, responsibility for their actions cannot be laid at the door of Local 38, absent a showing that Local 38 caused them to intentionally misrepresent the true facts.

The relationship between Local 38 and Local 1377 is the foundation for an argument by plaintiff that at the present time Local 38 makes the job referral procedures more difficult for Negroes. It is the Government's contention that Local 38 follows a policy of requiring non-member referral applicants to join Local 1377, and that as to Negroes such practice is discriminatory.

There is no question that referral applicants are strongly urged to obtain membership in an IBEW local, and that each of the Negroes who testified for the plaintiff and whose employment has been discussed herein is a member of Local 1377, although it may be noted that the membership of Mr. Tellis and Mr. Williams in Local 1377 is not shown to have been at the instigation of any of the Local 38 officials. It further appears from the record, however, that many Negroes have been referred by Local 38 without taking membership in Local 1377. Mr. Callahan, a Negro electrical contractor, affiliated with Local 38 with an agreement that his employees would not be required to join any union. It further appears that other Negroes who eventually took membership in Local 1377 were originally referred by Local 38 as non-union men. Thus the facts do not support the Government's position.

There is no evidence in the record to support the Government's theory that membership in Local 1377 was a discriminatory device imposed upon Negroes to discourage them from seeking employment through Local 38.

Plaintiff's own witnesses established that whites obtaining employment through referral from Local 38 were advised to first join Local 1377 before seeking referral. It appears to the Court that Local 38's primary concern is having all men working under its jurisdiction, Negro or white, be members of some union in order to avoid the problems inherent in having union and non-union labor working on the same project. The Government's argument that this policy of advocating union membership in Local 1377 is discriminatory, even though uniformly applied to all referral applicants, by reason of the possible interpretation Negroes may place thereon, is without merit.

An argument is made by the Government that Local 38 has discriminated in referral in not informing qualified Negroes of the opportunity for referral, stating that in 1968 Kenneth Johnson applied for apprenticeship but should have been offered referral. The Government, in its brief, suggests that many applicants seeking work through the union do not understand the distinction between membership, apprenticeship and non-member referral. The Court, having heard Mr. Johnson's testimony, is of the firm belief that he knew what he wanted. The fact of the matter is that Mr. Johnson was employed at the time he inquired about apprenticeship. In any event, there is no evidence in the record that the union gave any different information to whites than it did to Negroes in this regard.

Another instance of an allegation of discrimination unsupported by a showing of a differentiation in treatment between Negroes and whites is the plaintiff's statement that the union has failed to adequately inform those Negroes now working under the referral system of its mechanics. If that is so, then it represents a general failure on the part of the union to fully advise all referral

applicants, and while that practice may not necessarily be approved by the Court as good practice, it cannot be condemned as a violation of the Civil Rights Act.

Finally, while admitting that Local 38 has since July, 1967 referred a number of Negroes for employment, the Government contends that the union continues to follow policies which, although not discriminatory on their face, result in discrimination against Negroes because they perpetuate the effects of previous exclusion of Negroes. The evidence on this record supports a finding that since July, 1967 when the new union leadership took office there has not been a single instance of true intentional discrimination in the administration of the referral system. Mr. Acton testified that he has referred every qualified Negro electrician who applied for work, and the plaintiff has produced no evidence to rebut that testimony. There is other evidence in the record that the present union leadership has actively participated in programs designed to further integration of the craft unions, and to stimulate minority group interest in the electrical trade.

Mr. Wesley Toles, Associate Director of Community Relations of Case-Western Reserve University in Cleveland, testified that he and other persons interested in obtaining employment for minority groups had sent Negroes to Mr. Acton and that all who were qualified were referred for employment. Mr. Toles is himself Negro and is conversant with the question of race in relation to the craft unions, having for many years held positions with various governmental agencies whose activities were related to that problem. He tendered the opinion that while in the past Local 38 had been considered a problem union, it no longer had such a reputation. While that opinion is certainly not binding on the Court nor control-

ling on the issues herein, it does bear some relevance to the issue of the present intent of the defendant union.

It appears to the Court that the only way in which the defendant union could improve its statistical record with regard to Negro referrals would be to solicit Negro electricians for employment, which the Civil Rights Act does not require, or to grant preferential treatment to Negro referral applicants, which the Civil Rights Act does not permit.

At the present time there are over forty Negro electricians working on referral from Local 38. Approximately one-third of that group, including every individual as to whom post-Act discrimination was shown, has been working under the referral system for a sufficient period of time to qualify for the proposed Group I journeyman wireman's exam. Although the plaintiff argues that Mr. Pinkston is still only eligible for referral in Group IV, the fact of the matter with regard to Mr. Pinkston is that any discrimination which was practiced against him was pre-Act and was related to journeyman membership, not referral.

Since approximately 1960 there has been full employment in the electrical trade in the geographic area under the jurisdiction of Local 38, to the point where Local 38 has, at times, been unable to meet all contractors' needs, and referral applicants have had their choice of jobs. The record indicates that this condition is not expected to change materially in the foreseeable future.

Taking all of the post-Act evidence into consideration, the Court is of the opinion that the plaintiff's proposal regarding waiver of the collective bargaining agreement's experience requirements goes far beyond the limits of the order necessary to alleviate the effects of past discrimina-

tion. The legal predicate for that proposal by the Government is that a referral program which, though neutral on its face, continues the effects of prior discrimination must be considered as presently discriminatory, *Dobbins v. Local 212, supra,* p. 445.

The deficiency in that proposition is that it is not relevant to the record in this case. The effects of past discrimination have rather effectively been dissipated by the policies of the present union leadership. Each of the Negroes who was the subject of discrimination has advanced within the referral system to the point where the effects of the prior practice no longer affects his employment opportunities. As to other Negro electricians, as to whom specific discrimination has not been shown, the union's present referral policies coupled with actual economic conditions in the home building industry, make priority within the referral system an abstract consideration in relation to an individual's ability to obtain employment.

On this record, to grant the relief suggested by the Government would be very close to, if not an actual violation of 42 U.S.C. § 2000e-2(j) which prohibits preferential treatment to correct an existing imbalance. For example, if a white and Negro electrician each with over four years job experience, for the first time entered the referral system as of the effective date of the order the Negro would be placed in Group I and the white in Group IV. That would be true even though the Negro had never before thought of attempting to obtain employment through the union. The Court does not believe that the Government's proof in this case warrants such action. We are not dealing here with a situation comparable to discrimination within a seniority system in an industrial plant, such as was presented in *Quarles v. Phillip Morris,*

279 F. Supp. 505 (D.C. E.D. Va., 1968) and *United States v. Local 189*, 282 F. Supp. 39 (D.C. E.D. La., 1968). In those cases racial discrimination affected all members of an identifiable group, employees in a given plant or department, and waiver of certain requirements was necessary to overcome the demonstrable effects of that discrimination. In this case the record rebuts the conclusion that such a remedy is appropriate to overcome the proven effects of discrimination.

In conjunction with its proposal that certain of the collective bargaining agreement conditions for referral be waived as to Negroes, the Government seeks an order that Local 38 shall establish formal procedures for the referral of persons with less than one year of electrical experience and until such time as such procedures are formalized Negro applicants with less than one year's experience as an electrician and who are over the apprenticeship age shall be referred to Group IV. This Court should not require the union to establish a referral classification not provided for by the collective bargaining agreement unless the record indicates that such action is necessary to overcome the effects of past discrimination. As the temporary 2-B classification, which referral category was similar to the group proposed by the Government, was discontinued prior to July 2, 1965, this Court cannot grant any relief based on its former existence. While there is evidence that some whites without the requisite experience for referral were given employment after July 2, 1965, such practice was stopped by the present leadership and the number of such referrals in relation to the total referrals during the relevant period is small. The Court does not believe that the potential discriminatory impact of that discontinued practice is significantly meaningful to warrant the far-reaching relief proposed by plaintiff.

It appears to the Court that to grant the relief permitting referral of only Negroes with no electrical experience would be to create a favored class in order to correct an existing imbalance, which is prohibited by 42 U.S.C. § 2000e-2(j)..

The plaintiff has made other proposals regarding the relief hereunder. Certain of those are directed to a requirement that Local 38 strictly observe the collective bargaining agreement's conditions as to record keeping. There is no question that the union should comply with such requirements. Certain other proposals, however, would in effect make the United States a general supervisor of the collective bargaining process through which the referral program is formulated. The Court does not believe such an order is warranted in this case.

It is the Court's conclusion that the only relief necessary at this time, based upon the entire record, is a general order enjoining the defendant union from discriminating in the operation and administration of the referral system, and requiring observance of the terms of the collective bargaining agreement of May 1, 1968. Such an order is not to be construed as preventing Local 38 from continuing to recommend that referral applicants obtain membership in an IBEW local union, so long as that is not made a condition of referral.

Apprenticeship

This is the only aspect of the case involving the activities of the EJAC, which is a joint union-contractor board responsible for the administration of the union's apprenticeship program. Although the total number of persons appointed to serve on EJAC at any given time may vary, when it sits as an examining board for actual apprentice selection it is composed of six men, three from

the union and three contractor representatives. In addition to the regular members of EJAC, there is also a Secretary to the committee, who is permitted a voice in its affairs, but who has no vote in the apprentice selection procedures.

In considering the plaintiff's contention that EJAC has discriminated in the selection of apprentices the evidence may be separated into three periods:

1) Prior to 1965
2) 1965-1966
3) 1967 to present

The basis for this division is that the apprentice selection procedures were changed by EJAC in the years 1965 and 1967.

From the time of the establishment of the apprenticeship program until the summer of 1965 only two Negroes were selected as apprentices, one in 1963 and the other in 1964. The two Negroes who were selected were taken into the program after a civil rights protest regarding the absence of minority group representation in the crafts working on a Public Mall project in Cleveland and the intervention of the Cleveland Community Relations Board in the dispute. Following meetings with Mr. Ellsworth Harpole, Director of the Community Relations Board, the union agreed to immediately employ two Negroes on the project as temporary 2-B helpers and thereafter consider them for apprenticeship. Roger Freeman, previously mentioned in the discussion of referral, was one of the men employed as a temporary 2-B helper and subsequently was selected as an apprentice.

Having reviewed the record, the Court has concluded that there can be little doubt that prior to the effective date of Title VII the EJAC did discriminate in the selection of

apprentices. Such discrimination was not on a strictly racial basis, although the result thereof was the exclusion of minority group members.

Prior to 1965 EJAC had no regular standards for the selection of apprentices, utilizing factors shown in the candidates' applications and letters of reference. There was no fixed policy on the giving of tests or oral interviews to applicants.

It appears from the testimony of Mr. Aaron Caghan, who in late 1964 contacted the union regarding apprenticeship as Special Representative of the President's Committee for Equal Employment Opportunity, that the EJAC was, in effect, using a quota system in selecting apprentices. As with many other crafts during those years, nepotism was prevalent under that system.

Although Mr. Caghan testified that the persons concerned with apprentice selection told him that they believed that their methods were reasonable and democratic, and that they hoped to increase the number of Negro apprentices in ensuing years, the Court finds that such selection procedures were discriminatory, and if they had continued past July 2, 1965 they would have been in violation of Title VII of the Civil Rights Act.

During his meetings with the union and EJAC representatives, Mr. Caghan advised them that their selection program was in violation of recently adopted Federal Regulations on the subject of Equal Employment Opportunities, 29 C.F.R. Part 30. The union officials indicated that they were not aware of that fact, and would endeavor to conform their selection procedures to the requirements of the regulations.

In the apprenticeship class selected in the fall of 1964 it appears that 22 of the 26 apprentices selected were related to members of Local 38.

For the selection of its 1965 and 1966 apprenticeship classes, the EJAC adopted a testing procedure based on a 100-point scoring system. The test was divided into two 50-point segments, referred to in the plaintiff's presentation as non-oral and oral.

The non-oral portion of the test reflected scoring of the applicant's educational background, which was based on school transcripts, with a 30-point value, and the results of the applicant's performance on IQ and mechanical aptitude tests, with values of 10 points each. The administration and scoring of the two tests and evaluation of the applicant's educational background, were done by persons independent of the EJAC.

The 50-point portion of the test referred to as the oral examination was subdivided into two parts. Twenty points were allotted to the category of "mechanical tests suitable to trade by Joint Apprenticeship Committee," and 30 points to "oral interview," in which the factors of interest, appearance, ambition, physical potential, personality, and attitude were included.

Prior to beginning the oral examination, each member of the EJAC panel entered the applicant's non-oral grades on a scoring sheet. The applicant was then examined and each interviewer would, without prior consultation, enter a grade for the two oral factors. An applicant's final grade would be the average of the total score awarded by all members of the panel.

That testing procedure was registered by EJAC with the appropriate governmental agencies pursuant to 29 C.F.R. 30, and was given approval thereunder.

Selection as an apprentice was not dependent on achieving any particular score on the test. Prior to selection of the class a determination was made by EJAC as to the number of apprentices to be selected, and the cut-

off point was, therefore, the score of the lowest scoring candidate selected. That level would vary from class to class.

The plaintiff contends that the foregoing testing procedure was applied discriminatorily in the selection of the 1965 and 1966 apprenticeship classes.

Although the bulk of the evidence in support of that argument is statistical, there is one matter which rests on testimonial evidence. The Government contends that Negroes and whites were asked different questions on the oral side of the test. Having reviewed the testimony of the three apprentice applicants who testified on this matter, and of other witnesses who testified generally as to the nature of the oral side of the testing, the Court does not agree with the Government's conclusions based thereon.

While it is true that the testimony of the apprentice applicants indicates that they were not all asked the same questions or called upon to perform the same tasks, there were basic similarities in the interviews of all three. It does not appear that anything required of any of the applicants can be said to have been irrelevant to the purpose for which they were being examined. The EJAC had no fixed pattern for the oral side of the test, and, as it appears that in 1965 and 1966 many persons alternated on the six-man examining board, a variation in content of the exam might reasonably be related to a change in personnel. There is no evidence that the one white and two Negro apprentice applicants who appeared as witnesses were examined by comparably composed EJAC panels. It is, therefore, the Court's opinion that plaintiff has failed to prove an intent on the part of EJAC to practice racial discrimination by subjecting Negro apprentice applicants to a more stringent oral exam than that given whites.

The balance of the plaintiff's proof on this question is essentially statistical. It is the plaintiff's contention that the statistics demonstrate that in 1965 and 1966 Negro applicants were discriminated against, in that they were given unwarranted low scores on the oral side of the testing procedure, thereby resulting in their rejection as apprentices.

The first apprenticeship class to which the testing procedure under consideration was applied was in April, 1965. From that class 30 white applicants were selected as apprentices. Eight Negroes were tested and interviewed by EJAC, none of whom was selected.

The Government relies upon the pre-Act evidence pertaining to this class as proof of a pattern and practice of discrimination which it is contended extended beyond the critical July, 1965 date. It is the plaintiff's position that the fact that none of the rejected Negro applicants had an oral score over 33, whereas many white applicants, including some with non-oral scores comparable to the non-oral score of the Negro applicants, received substantially higher oral scores, is proof of discriminatory grading.

The Court has considered all the documentary evidence available for that apprenticeship class, which is in an exhibit prepared by the plaintiff. The said exhibit contains the application form, portions of the independent IQ and mechanical aptitude test materials, the EJAC Secretary's apprentice evaluation form reflecting the applicant's average final grade, and one examiner's completed apprentice evaluation form, for each of 28 of the 30 white applicants selected and for the 8 Negro applicants rejected in the April, 1965 apprentice selection procedures.

It does appear from the said exhibit that the Negro applicants received lower total grades on the 50-point oral phase of the testing than did the successful white appli-

cants. There are, however, two other factors which appear from the said exhibit that cannot be disregarded.

First, the scoring sheets reflects that as a group the evaluation of the educational background of the Negro candidate was not materially different from that of the successful white applicants. The performance of the Negro candidates, however, did vary significantly from that of most of the white candidates on the IQ and mechanical aptitude tests, the Negro group scoring much lower.

Second, the individual grading sheets for the Negro applicants reflects that on the 50-point oral side of the test the greatest down-grading was in the 20-point block relating to mechanical aptitude, and not in the 30-point oral interview block. The individual grading sheets contained in the exhibit reflect rather good grades for 4 of the 8 Negro applicants on the actual oral interview.

The following table reflects the data for the 8 Negro applicants. The IQ and mechanical aptitude test scores, based on a total possible score of 10 each, would be uniform as to all EJAC members, as they represent the recorded result of independent testing. The scores on the EJAC mechanical aptitude test and oral interview do not represent the applicant's average total scores for those factors, as that data is not contained in the record, but rather are the scores shown on the individual grading sheets contained in the plaintiff's exhibit:

Applicant Number	IQ Test	Mech. Apt. Test	EJAC Test	Oral Interview
140	6	0	30	25
85	6	10	35	37
181	6	0	35	28
156	2	4	35	15
99	2	0	35	20
37	2	0	30	25
118	8	0	30	21
125	8	9	30	18

It appears to the Court from these results that there is at least a strong possibility of a direct correlation between achievement on the independent mechanical aptitude tests and the EJAC mechanical aptitude tests. That possibility is further supported by the fact that in most instances the successful white applicants reflect a positive correlation between the grades scored in both aptitude test categories.

Without having comparable documentation from among the rejected white applicants, the Court is without sufficient data to ascertain whether the scoring of the Negro candidates was materially different from that of whites who had truly comparable ratings on their non-oral performance. The non-oral scoring of the accepted white applicants is not, when considered in detail, sufficiently comparable to provide the foundation for such an analysis.

Consequently, although the data as to the 8 Negro applicants, and particularly applicants numbers 85 and 125, raise some question as to whether they were fairly scored on the 50-point oral phase of the testing procedures, the Court does not believe that the record is sufficient to support a finding that there was intentional discrimination in the selection of the April, 1965 apprenticeship class.

For the apprenticeship class selected in August, 1965, it is stipulated that 158 applications were originally filed, 11 from Negroes and 147 from whites. It is further stipulated that 110 persons were tested and interviewed, 104 whites and 6 Negroes. Thirty-one apprentices were selected for the class, all of whom were white.

The evidence in the record pertaining to this class is somewhat different from that available as to the April, 1965 class. The stipulation contains the total non-oral and

oral scores of all persons tested and interviewed. The plaintiff has also submitted an exhibit containing documentation as to all the successful white applicants and the 6 Negro applicants. That exhibit, however, only contains the summary sheet of the EJAC Secretary, which reflects the categorical point assignments on the non-oral side, but does not show any division of points between the two categories on the oral side.

The test data relevant to the Negro candidates which can be derived from this record is as follows:

Applicant No.	IQ Test	Mechanical Apt. Test	Total Oral Score
300	6	0	40
267	2	0	25.3
237	2	0	29.6
226	2	0	28.5
320	8	10	25
310	8	4	33.6

It thus appears that, with the exception of applicant No. 320, the Negro applicants performed very poorly on the independent mechanical aptitude test. The range of total non-oral scores for the 5 Negro applicants, other than No. 320, was from 24 through 32, with an average of 28.4. In the absence of proof of the details regarding the total oral score, the record does not establish in what category the Negro applicants were down-graded by the EJAC. However, if one assumes any degree of constancy between the scoring pattern as developed in the April, 1965 class and that for the August class, the logical conclusion is that the Negro applicants would have accumulated the majority of their total oral points on the 30-point oral interview block, with a low score in the 20-point mechanical aptitude factor.

From the statistical evidence available, it appears that the total oral grades of the six Negro applicants were, on the whole, lower than the total oral grades of white appli-

cants and moved within a narrower range. It further appears that the oral grades received by the Negroes did not show the same upward movement from their non-oral grades as was the case with the majority of white applicants. However, approximately one-third of the white applicants had a pattern of scoring differential between non-oral and oral grades comparable to that of the Negro applicants. It further appears that the average non-oral score of all white applicants was higher than that of the Negroes, and that the average non-oral score of all the 31 white applicants selected as apprentices was 36.9.

The statistics also indicate that there were 56 white applicants who scored between 26 and 32 non-oral points, the range of five of the six Negro applicants, and of that group 47 failed to qualify for apprenticeship. There were 25 white applicants who scored higher than 32 non-oral points who were rejected, including the son of the man then President of Local 38 and Chairman of EJAC.

While the Government relies on the comparison of the total oral scores given to the Negro candidates in relation to the total oral scores given white candidates as proof of discrimination, the Court cannot accept the same as being conclusive on the point. By reason of the fact that the record does not reflect the allocation of points between the aptitude test and oral interview factors on the oral side of the exam, the Court is unable to truly evaluate the significance of the Negro candidates' total oral scores. The plaintiff's theory would call upon the Court to accept the possibility that the Negro candidates were discriminatorily graded, and reject the possibility that the total oral scores were correlative to performance on the independent testing. It is also possible that the Negro applicants appeared before the same examiners who scored approximately one-third of the white appli-

cants in the same pattern of relationship between non-oral and oral scores as is shown for the Negro group. It is the Court's opinion that so long as the record suggests different possible explanations for the grading of the Negro candidates it cannot be said that the Government has sustained its burden of proof.

Negro applicant No. 320 was the only one of the group who scored well on the non-oral test, receiving a total grade of 46, but he was only awarded 25 points on oral exam, thereby missing the cut-off point of 77 for the class. Standing alone, this would seem to indicate that there was discrimination practiced against him. The record, however, reflects that almost one-third of the white applicants who scored over 40 non-oral points missed selection as apprentices by reason of receiving low oral scores. This full picture weakens the Government's contention that the rejection of applicant No. 320 was for racial reasons.

The next apprenticeship class to which any Negroes applied for admission was in August, 1966. It is stipulated that of 220 original applications, 22 were Negroes, and that 125 whites and 14 Negroes were found qualified and continued on to be tested and interviewed. The same testing procedures in effect in 1965 were utilized for selection of that class, and 60 apprentices were selected, one of whom was Negro.

The Court has carefully considered the documentary evidence in the record pertaining to the 1966 class, which is in the same form as for the August, 1965 class, and finds the same general pattern presented as was true for the two 1965 classes.

Of the 14 Negro applicants, one scored 2 out of the possible 10 points on the independent mechanical aptitude test, and the remainder scored no points. The groups

average score on the IQ tests was approximately 6.3, and their average aggregate score for the two independent tests was approximately 6.4 out of a possible 20-point total. The successful white applicants, as a group, had substantially better performance levels on those tests.

It appears from the statistics in evidence that the Negro group, as a whole, averaged lower on the oral side of the test than did the whites, as a group, and that, as a group, their oral scores moved within a narrower range both in point spread and in relation to non-oral scores, than did the scores of whites. It further appears, however, that their non-oral scores, as a group, were lower than those of the white applicants, as a group, the highest non-oral score achieved by a Negro being 36.

Although there were some white applicants who scored in the same non-oral range as the Negroes who were selected as apprentices, there was a greater number of whites who scored over 36 non-oral points who were rejected by reason of low oral scores. There were several whites with non-oral scores of 40 or over who were eliminated on the oral testing. As the cut-off point for the 1966 class was only a total grade of 70, such applicants necessarily received very low oral scores.

On this record, it appears that the Negro applicant who was selected achieved admission into the 1966 apprenticeship class in exactly the same manner as did several of the whites, by combining a good total oral score with an average non-oral performance.

The Court's overall conclusion pertaining to the 1966 apprenticeship class is essentially the same as with regard to the 1965 classes. While the general variations in grading between the Negro candidates, as a group, and the white candidates, as a group, might indicate that discrimination was practiced, the record permits of other

reasonable alternative explanations for the failure of the Negroes to be taken into apprenticeship.

The major evidentiary deficiency in this record is the absence of evidence of the relationship between the oral scores of the Negro applicants in 1965 and 1966 and the oral scores of a significant number of white candidates who performed in a truly comparable manner on the non-oral tests. Although the Court has the total oral and non-oral scores for all applicants in the August, 1965 and August, 1966 classes, the detailed scoring is only available as to the Negro candidates and the successful white candidates, and as between those two groups there is not a sufficient identity of performance on the non-oral side of the tests, when considered in their details rather than as total grade, to make a meaningful comparison. If this record contained evidence that a significant number of whites received substantially higher oral grades than did the Negro applicants despite the fact that the two groups performed in a reasonably comparable fashion on the non-oral tests, that would provide evidence of discrimination. The Court has found no such proof in the record.

There is one other item of evidence relevant to the question of the performance of the apprentice applicants. Mr. Toles, of Case-Western Reserve, testified regarding a pre-apprenticeship program he was conducting at the university. In that program high school graduates are given a combination of on-the-job training and schooling to prepare them for apprenticeship tests in the trades. Mr. Toles testified that in interviewing Negro and white youths, coming from the same school backgrounds, he found the whites to be better informed as to what the various crafts, including the electricians, entailed and better motivated toward entering a particular craft.

If this commentary by Mr. Toles is reflective of the

circumstances of the EJAC apprenticeship interviews, it would provide a legitimate basis for a scoring differential between white and Negro candidates. This is not to say that an apprenticeship examining committee should disregard the realities of urban living, which many experts believe place minority groups in an unequal position with regard to their ability to acquire exposure to environmental influences which prepare them to compete on even terms with middle-class groups for a position in industry and the trades. This Court believes that testing procedures for such positions should, with the aid of experts in the field, be re-examined to take such considerations into account. The issue in this case, however, is not whether the EJAC procedures could have been more sociologically satisfactory, but rather whether the grading patterns in 1965 and 1966 disclose an intent to discriminate.

Based on all the foregoing, it is the Court's conclusion that the plaintiff has failed to carry the burden of proving that the Local 38 EJAC engaged in an intentional pattern and practice of discrimination in the administration of the apprenticeship selection procedures in 1965 and 1966. The evidence raises some doubts and suspicions in that direction, but there are simply too many holes in the evidence for the Court to find other than that the plaintiff has established the possibility that Negroes were the subject of discrimination. It is the Court's opinion that the Civil Rights Act requires a stronger showing than that before the Court may find that the plaintiff has proved its case.

The testing procedures utilized in 1965 and 1966 were not carried forward into 1967. Following communication from a representative of the Department of Labor to the Ohio State Apprentice Council, which had approved the

existing test, and the intervention of the Department of Justice in this matter, the EJAC adopted a plan for apprenticeship selection known as the national plan, or yellow book. The composition of the committee was also altered by the reduction of the number of persons who served thereon, so as to create greater uniformity in the examining panels, and the replacement of the incumbent union representatives by persons appointed by Mr. Steele, who was then President of Local 38 and as such served as EJAC Chairman. Mr. Steele had not previously served on EJAC.

The national plan had been developed a few years earlier, by the staff of National Joint Apprenticeship and Training Committee for the electrical construction industry. The NJAC is supported jointly by management and labor on a national basis, and is designed to promote and aid apprenticeship programs throughout the industry.

This plan had been determined to be consistent with 29 CFR Part 30 on a national basis by the U. S. Department of Labor on May 26, 1966, and on August 11, 1967 it was registered by the Bureau of Apprenticeship and Training, which is a bureau of the Department of Labor, for the Local 38 EJAC with the Ohio State Apprenticeship Council.

There is a dispute between the parties as to the derivation of the national plan, which has resulted in the filing of post-trial evidentiary material with the Court. It is the Court's opinion that the controversy on such issue has risen far beyond its relevance to this case. The identity of those who participated in the formulation of the plan is not critical herein, for the testing procedure must rise or fall on its own merits. Suffice it to say that the Court believes that the persons who participated in the drafting of the procedures which culminated in the national plan

have been shown to have professional competence in the field of apprenticeship selection.

The national plan testing procedures are contained in a booklet form. Four pages of the book represent the actual scoring sheets, and the balance of 17 pages written material (including cover pages) is basically instructional.

The first page of the rating form covers certain basic prerequisites, and is used to determine if the applicant is qualified to proceed to oral interview.

The second and third pages constitute what has been referred to as the objective side of the test. They start with an evaluation of math and science background, and the form provides for rating in six classifications ranging from no background to excellent background. Unlike the procedures under the 1965 test the applicant's educational background is not independently evaluated. Rather, preceding the oral interview each applicant's educational background data is presented to the examiners, and each examiner evaluates it himself. The next categories are aptitude tests and other required tests. EJAC did not administer any tests which fell in the other required tests category. As to aptitude tests, the Ohio State Employment Service administered a test known as B 317. The results, however, were transmitted to EJAC in terms of H, C and L. L score represented low, and such persons were not called for oral interview. As to the H and C scores, the EJAC was advised that they were quite comparable, and thus would not give much guidance in differentiating between candidates.

Page three of the test contained a category for evaluation of general education, again with six scoring blocks ranging from poor to excellent background. It also contained two categories relating to aptitude or achievement tests, which are not utilized by the Local 38 EJAC, and

an evaluation of physical factors. As to physical factors, each candidate was scored satisfactory unless his basic application, or the oral interview, disclosed a possible health deficiency which would affect his ability to perform as an electrician. In that case he would be referred to a physician for a further check-up or asked to produce additional medical evidence.

This is the extent of the objective side of the national plan test procedure. It thus appears that the only portions of the objective test which would produce any meaningful difference in scoring among the applicants would be those evaluating the candidates' educational backgrounds.

The fourth page of the test reflects the oral interview factors, and has been referred to as the subjective test. The factors evaluated on the subjective side are interest, attitude, and personal traits. Each of those has five possible scoring blocks. The personal traits category has an "unacceptable" block, and it was stated that a candidate could be eliminated from consideration on that basis. The evidence reflected, however, that such action was rare in the national experience under the plan.

Finally, there is the grade assignment for the applicant. That is done on a scale ranging numerically from 10 through 120 in ten-point intervals, with each interval carrying a letter grade. This final grade represents each interviewer's total assessment of the applicant, and does not represent an averaging of scores achieved in the several categories. These final grades, as well as the other scoring, are entered by the individual examiners on their separate sheets without mutual consultation. The evidence indicated that while some examiners would assign a number or letter grade in scoring the various categories, others would simply make a mark in the scoring box they

considered applicable for that subject, and in a few instances no entry was made for a particular subject. The applicant's final grade was determined by averaging the individual scores awarded by the committee members.

The Government's attack upon the current selection procedures is not based on an attempt to demonstrate discrimination in actual apprentice selection, as was done for 1965 and 1966, but is rather predicated on the proposition that the procedures are essentially subjective and discretionary, and are inherently discriminatory. It is argued that:

> It is of particular importance, then, in light of the EJAC's long history of racial discrimination to ensure that the current selection system is objective and reviewable. For in these circumstances a discretionary system constitutes an unlawful vehicle for further discrimination.

Before considering the plaintiff's arguments as to the inherent discriminatory nature of the national plan, the facts as to its actual performance should be considered.

In 1967, 343 original applications for apprenticeship were filed, 289 from whites and 54 from Negroes. Of those, 117 whites and 38 Negroes did not have the necessary requisites or did not appear for testing or interview. Of the 172 whites who were interviewed, 63 were selected as apprentices. Of the 16 Negroes who were interviewed, 4 were selected as apprentices.

There were three other Negroes admitted to the 1967 class in addition to those taken in through the normal procedures. After assuming office, Mr. Acton was informed of the Government's charge of discrimination in the operation of the apprenticeship program. At a meeting in July, 1967 the union agreed to offer a place in the next apprenticeship class to 13 Negroes whom the Gov-

ernment alleged had been the subject of discrimination in 1965 and 1966. Of that group, three accepted the offer, two declined, two failed to respond to the notice letter, one could not be located, and five were in military service. As to those in the military, the offer still remains open.

In 1968, 670 original applications were filed, 607 by whites and 63 by Negroes. Of that group 367 whites and 24 Negroes were tested and interviewed. A class of 100 apprentices was selected, being constituted of 87 whites and 13 Negroes. Seven of the 12 Negroes who were unsuccessful in the 1967 test reapplied in 1968, and four achieved acceptance on that second attempt. It appears from a review of the documentary evidence of prior years that many whites who failed on a first try were also able to achieve a better result in a subsequent class.

These statistics, on their face, would indicate that the present system is operating free from discrimination. The Government contends, however, that such conclusion cannot be drawn in that the system is not subject to review and therefore it cannot be determined if there were additional Negro applicants who, although well qualified, were rejected. The plaintiff, however, has had access to all relevant documentary material for the 1967 class, and has not made any claim of specific discrimination based thereon. On the other hand, the expert witness for the defense on this subject of apprenticeship testified regarding a system of review which he developed, and stated that it had indicated the possibility of two instances of discrimination against Negro applicants, but that when he checked the detailed data regarding those applicants he concluded that such was not the case.

There is no doubt that the national plan under which the EJAC is now operating has a substantial subjective element in it, and as such the label of "discretionary" at-

tached to it by the plaintiff is not totally unreasonable. To say, however, that a test is discretionary does not automatically mean it is discriminatory. A degree of discretion is not, in and of itself a vice. It is the manner in which that discretion is exercised that is critical. There is testimony in this record by witnesses conversant with the problem, that Negro youths in this geographic area as a group, are among those persons referred to by sociologists as culturally deprived, although they do not constitute the entirety of that segment of the populace and not all can be so categorized. As such they are at a general disadvantage in competing with suburban white youth on the basis of education and background. A testing procedure with a discretionary element can be used to penalize the culturally deprived for deficiencies which society has created, and thus further restrict their opportunities to join the mainstream of modern life. On the other hand, if such discretion is wisely exercised, one may acknowledge these realities of present urban conditions and make allowances therefor, thereby narrowing the built-in differential between individuals coming from unequal environments. On this record there is no evidence that the Local 38 EJAC has taken advantage of the discretionary aspects of the national plan to practice racial discrimination.

In summary, the plaintiff has shown a generally discriminatory approach to apprenticeship by EJAC prior to July 2, 1965. Although the evidence for the years 1965 and 1966 would support a strong suspicion of racial discrimination, the plaintiff has failed to prove an actual pattern and practice of discrimination continuing beyond July 2, 1965. Consequently, the plaintiff is not entitled to a finding in its favor, with a mandatory order directed to EJAC, on this subject matter.

Notwithstanding this determination, the Court believes that during the course of the trial certain possible weaknesses in the national plan, and the manner in which it is utilized, came to light. The defense expert, who to a substantial degree authored the national plan, acknowledged that it had some deficiencies. Although the Court cannot enter a mandatory order requiring changes in the national plan as it is used by Local 38, in that plaintiff has not shown it to be a vehicle for discrimination, the Court recommends that the NJAC and Local 38 EJAC consider the ensuing commentary and adopt such variations in their present procedures as may be warranted, seeking the advice and assistance of any agencies, public or private, that could aid in such an effort. This discussion is not intended to alter or detract from the Court's finding that the present system is adequate and appears to be functioning fairly. As agreed by both experts, there is no perfect method for apprentice selection, and any existing system is subject to improvement.

The first area which might be considered are the evaluation guidelines and standards set forth in the national plan. It appears that, at least as to the Local 38 EJAC, the interpretation of the standards has led to a variation in grading patterns between examiners. It should be stated, however, that while the examiners showed differing scoring patterns they maintained reasonable individual consistency and their patterns did not evidence any discrimination. It is the Court's opinion that a more uniform grading pattern might be achieved if the standards were revised to reflect a greater precision in directing the examiner to specific factors and attributes to be considered in candidate evaluation and providing more concrete suggestions as to appropriate scores based upon the factors disclosed by the application form, educational data,

and interview. The Court is further of the opinion that if such a revision is made, the guidelines should convey to the examiner some guidance in evaluating an applicant from a culturally deprived environment.

Improved guidelines and standards will only be beneficial if they are reflected in the actual examination scoring. The record indicates that the scoring habits of individual examiners with regard to noting grades on each subject matter were not consistent, nor was there any uniformity with regard to the entry of written comment. The Court would therefore recommend that steps be taken to insure that each examiner note a score for each subject matter under some uniform system, that a written comment for each subject matter be noted reflective of the score, and that a general written summary be required in support of the final grade.

It is the Court's belief that if these steps are taken the questions of reviewability of the national plan testing procedures will no longer exist. The Court is satisfied from the demonstration of the defense expert that it is presently possible to determine the existence of a pattern or practice of discrimination under the national plan on the part of an examining committee as a whole or any individual thereon, and that if such a pattern or practice were detected, individual test results could then be checked for specific discrimination. The potential problem area is in the verification of actual individual discrimination. Plaintiff's expert testified that even at this time if the examiners were to follow the instructions and standards under the present plan a determination as to racial discrimination could be made. It follows that the more definite the guidelines are and the more closely they are adhered to, the more accurate a determination of the issue can be made.

Related to this matter of review is the question of internal appeals procedures. It appears that the right of appeal from an EJAC decision, provided for in the collective bargaining agreement, has not been utilized because the applicants have not been sufficiently advised of its existence. The Court would therefore recommend that the notice to rejected applicants be revised so as to reflect the applicant's grade, the minimum grade for admission, and specifically reciting the appellate rights available. It has also been suggested that a recording or transcript of the oral interviews should be preserved for presentation before the reviewing panel, and the Court believes that such suggestion warrants serious consideration.

One other step which could be taken in the direction of aiding apprenticeship examiners is instruction by NJAC representatives, who are available for consultation on all matters relating for consultation on all matters relating to apprenticeship. It appears to the Court that the prior instructional meetings between the NJAC representatives and the Local 38 EJAC were of short duration. The Court believes that the NJAC could undertake a program of intensive instruction for those local committees who wish to upgrade their selection procedures, with particular emphasis on the matter of evaluation of candidates from diverse backgrounds and the ways in which interview procedures can be varied to fully explore the actual qualifications of each candidate.

In making these recommendations, the Court has taken into consideration the testing procedures proposed by plaintiff in its suggestions as to the relief which would have been sought as to apprenticeship.

The plaintiff's primary thesis was that the element of discretion should be taken out of the testing procedures

and virtually the entire selection process be dependent on "objective" factors, with a permissible maximum of 10% of the total grade allocated to oral interview.

A strictly objective test would focus squarely on an applicant's educational background. The plaintiff's own expert testified that most minority group members come from a culturally deprived environment and their educational opportunities and experiences are inferior to persons of a middle-class background. It would thus seem logical that a selection procedure based on such considerations would inevitably diminish the possibility of an applicant from a disadvantaged segment of the community achieving admission into an apprenticeship program.

The Court has also considered the selection procedure described by plaintiff's expert, which he used in selecting persons for the position of bus dispatcher, which results in an applicant being rated as either unacceptable, acceptable or outstanding. While such a testing procedure may be perfectly satisfactory in dealing with a promotional system where job seniority can also be taken into account, it does not appear to be appropriate for apprentice selection. If there were more candidates achieving acceptable and outstanding ratings than there were apprenticeships to be filled, the class would have to be selected on a lottery basis.

CONCLUSION.

In the prosecution of this lawsuit, the plaintiff had the burden of proving an intentional pattern and practice of racial discrimination, extending beyond July 2, 1965, the effective date of the Civil Rights Act of 1964, on the part of the defendant Local 38 in the areas of journeyman membership, contractor affiliation and referral for employment, and by defendant EJAC in the area of apprentice selection.

As to journeyman membership, there was no proof of a violation of Title VII of the Civil Rights Act by the union's refusal to grant direct journeyman membership to Negroes, as no white person had ever been accorded that privilege. The tangential issue of achieving journeyman membership through the referral system is not probative of the claim of discrimination by the denial of applications for direct journeyman membership.

On the issue of contractor affiliation, there has been a failure of proof. Local 38 had three affiliated Negro contractors before July 2, 1965, and the plaintiff's claim that Negroes seeking affiliation thereafter were treated unequally with whites is not sustained by the evidence.

The plaintiff has carried its burden of proving that a pattern and practice of racial discrimination existed beyond July 2, 1965 as to referral for employment. The record further establishes, however, that such practices ended soon after the election of the officers who took charge of Local 38 in July, 1967. There is no evidence that any Negro electrician is, at the present time, unable to secure employment under the referral system by reason of racial discrimination. Each of the individuals who was the subject of actual discrimination after the Civil Rights Act became effective and who thereafter sought referral secured employment, and is now eligible to take a journey-

man wireman's exam for classification in the highest priority group of the referral system, which classification carries with it the right to apply for union membership. This Court continues to retain jurisdiction over the question of the journeyman wireman's exam, and the right to apply for union membership attendant thereto, by virtue of the pending motion directed to that subject matter.

With regard to apprenticeship, the plaintiff has proved that EJAC selected apprentices in a discriminatory manner prior to July 2, 1965. The post-Act evidence, however, does not establish that EJAC engaged in an intentional pattern and practice of racial discrimination thereafter, although the record raises a suspicion that such may have been the case with regard to the 1965 and 1966 apprenticeship classes. As to those years, each of the Negro applicants identified by the Government as having been discriminatorily rejected was offered the opportunity to become an apprentice by the new union leadership in 1967.

The Court will therefore enter an order enjoining the defendant union from discriminating in the operation and administration of the referral system, and from denying equal employment opportunities to all persons with regard to the referral system, and also requiring strict adherence to the collective bargaining agreement provisions relating to the referral system. The said order will also provide for retention of jurisdiction over defendant Local 38's motion of January 17, 1969 pertaining to the issue of the journeyman wireman's exam, and all issues pertinent thereto.

This Memorandum is adopted as Findings of Fact and Conclusions of Law, in accordance with Rule 52 of the Federal Rules of Civil Procedure.

United States District Judge.

APPENDIX C.

SUPPLEMENTAL OPINION OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

No. C67-575.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38,
ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendants.

(March 21, 1969.)

GREEN, District Judge:—Subsequent to the trial of the within action the defendant local 38 stated its intention to proceed with administration of an examination to non-union members working under its referral system. Those electricians who passed the examination would be placed in Group I of the referral system, and would thereafter be entitled to apply for journeyman membership in the union.

When the Government became apprised of the fact that the union intended to proceed with the test, a motion was filed to restrain the union from going forward. That motion was granted, with leave to the union to reapply to the Court for permission to give the test at a later date.

On January 17, 1969, the union filed a motion denominated "Motion to dissolve restraining order" which sought leave to proceed with the test.

In the memorandum opinion and order on the principal issues of this action the Court retained jurisdiction over the case for the purpose of ruling on the said motion and all issues pertinent thereto. The subsidiary issues relevant to this matter pertain to certain conditions proposed by the Government as to eligibility to take the test and the rights to be accorded those who were successful in passing the examination.

As indicated in the Court's memorandum opinion, the Court believes that the union should go forward in giving the examination. It is the procedural matters pertinent thereto that must be resolved at this time.

Having reviewed the proposed notice of examination prepared by defendant Local 38, the Court finds that it is basically adequate. There are, however, two changes which will be ordered incorporated therein.

The concluding sentence of the first paragraph of the proposed notice will be ordered amended to read:

> Further, only members of Group 1 are eligible to apply for journeyman membership in Local 38 in accordance with Articles XXI and XXII of the IBEW Constitution and Article XIII of the By-Laws of Local 38.

Such revision is necessary to fully apprise test candidates of the possibility of achieving union membership through the referral system.

Although the examination notice as submitted by the union does advise the applicant of his appeal rights, it does not reflect that the applicant will be given access to his graded examination sheet if he should fail the test. The Court believes that such right is necessary. It will there-

fore be ordered that such right be granted, and that the first two lines of the concluding paragraph be amended by striking the words "and feel you have any complaint against it's conduct or it's content" and by the insertion of the following in place thereof:

> you may review your graded examination papers, and if you thereafter desire a review of the conduct or content of the examination of the grade which you received thereon.

Turning now to the Government's proposals pertinent to this matter, the Government, in essence, suggests a waiver of the experience under the collective bargaining agreement as a prerequisite for eligibility to take the examination and that Negroes who pass the examination be admitted to union membership based thereon without the necessity of a vote of the membership.

As to the waiver of eligibility requirements, the proof established that all Negroes who were the subject of specific discrimination regarding referral are now eligible to take the examination. There are, in addition, a substantial number of other Negroes presently eligible to take the examination who were not shown to have been discriminated against.

As to the direct admission to membership, the Court has previously found that plaintiff has failed to prove that the defendant has utilized general membership votes as a discriminatory device.

Based on the Court's findings on the merits herein, the Court does not believe that the action requested by the Government is either necessary or warranted. If it should hereafter develop that there appears to be a pattern or practice of discrimination with regard to admission to membership as applied to persons placed in Group I, that

problem can be dealt with when it arises, and should not be anticipated at this time.

The Government also seeks a continuing order requiring the union to submit for prior approval the proposed examination and the procedures relevant thereto. That request will be denied.

Finally, there is the matter of the time for the giving of the examination. The Court will order the examination given no sooner than 30 days from entry of the order on this motion, and no later than ninety days thereafter. The notice to applicants shall provide for a 30 day period between the date of notice and the date of examination. These time limitations will permit the defendant union adequate time to prepare and distribute the required notices, and should provide ample opportunity for those wishing to take the examination to prepare for same.

APPENDIX D.

OPINION OF THE COURT OF APPEALS.

No. 19658.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO 38; ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided and Filed June 19, 1970.

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

EDWARDS, Circuit Judge. On July 2, 1964, the following federal statute was adopted as a part of the Civil Rights Act of that year:

"(c) **Labor organization practices.**

"It shall be an unlawful employment practice for a labor organization—

"(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

"(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

"(d) **Training programs.**

"It shall be an unlawful employment practice for management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(c) (1964).

These provisions became effective as to this union July 2, 1965. 42 U.S.C. § 2000e-(e) (1964).

In the opinion which decided the instant litigation in the United States District Court for the Northern District of Ohio, Eastern Division, the District Judge included a table showing the racial composition of the membership of defendant Local 38 of the International Brotherhood of Electrical Workers. That table follows:

Date	White	Negro
Jan. 1, 1957	1049	0
Jan. 1, 1960	1101	3
Jan. 1, 1965	1292	2
July 1, 1967	1316	2
Oct. 1, 1967	1329	3
Sept. 25, 1968	1331	4

The Attorney General of the United States initiated this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15 (1964), *as amended* (Supp. IV 1965-68), on August 8, 1967. The complaint alleged that in violation of the statute just cited, defendants had engaged in and were engaging in racial discrimination by excluding Negroes from union membership and by discriminating against them in the union-operated work referral system, in the joint union-contractor apprentice program, and in the contractor affiliation program. Defendants denied these charges generally, and specifically denied any such discrimination after the effective date of the Act.

The District Judge found that there had been an historic pattern of racial discrimination in the operations of Local 38 and the Electrical Joint Apprenticeship and Training Committee (EJAC); that such discriminatory practices had continued after the effective date of the Civil Rights Act in the union-operated employment referral system; that while there was evidence that raised a "strong suspicion" of discrimination in the apprentice selection process following the effective date of the Act, such evidence was insufficient to support a positive finding of discrimination; and that the evidence did not support findings of post-Act discrimination in relation to union membership and contractor affiliation. He further found that under a new union local leadership, which came into office after the filing of the complaint in this case, all discriminatory practices had stopped as a result of good faith efforts on the part of the new administration of the local to follow the Act. The District Judge entered a judgment enjoining any continuation of discriminatory practices in the referral system. He specifically refused to order affirmative relief designed to alleviate the continu-

ing effect of the past discriminatory practices. He also refused the government's request that the court retain jurisdiction of the case.

The government has appealed, contending primarily that the relief afforded was inadequate to effectuate the purposes of the Act. We reverse.

The District Judge in an 87-page opinion analyzing this case, relied heavily upon *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 280 F. Supp. 719 (E.D. Mo. 1968). This case, which dealt with similar claims of discriminatory practices on the part of an IBEW local in St. Louis (as well as a Sheet Metal Workers Local), has now been reversed in a decision of the United States Court of Appeals for the Eighth Circuit, *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123 (8th Cir. 1969). We believe Judge Heaney's opinion represents a sound interpretation of the critical sections of the Civil Rights Act of 1964 and regret that the District Judge did not have the benefit of its reasoning.

STATEMENT OF THE CASE.

The defendant local union (Local 38 of the IBEW) is a construction trades union which has jurisdiction over the electrical trades in the construction industry in the area of Cleveland, Ohio. Defendant, Electrical Joint Apprenticeship and Training Committee, is a union-management controlled committee which operates a training program for electrical trade apprentices in the same area. The union and the industry each have three members on the committee which controls apprentice selection and training. It operates in the union hall.

Local 38 has about 75% of the construction industry in the Cleveland area under contract and by union-industry agreement it operates a hiring hall and referral

system for the organized portion of the industry. Under its referral practices and the collective bargaining agreement, all eligible journeymen electricians who are members of Local 38 are referred out first before any other persons desiring to work in the electrical trades are referred for jobs.

There are two methods of becoming a journeyman electrician. The first is through acceptance in and completion of the apprentice training program operated by defendant EJAC. The second method of becoming a journeyman is by taking a journeyman's examination given by the union. No such examination had been given except in the year 1959, when it was administered to 24 white applicants, all of whom failed.

The complaint filed by the United States alleged an historic practice of discrimination against Negroes in relation to selection of apprentices, in work referral, and in union membership before the effective date of the Civil Rights Act of 1964. It also alleged that these discriminatory practices continued in somewhat altered form thereafter.

The District Judge found that prior to the effective date of the Civil Rights Act, both defendant Local 38 and defendant EJAC discriminated against Negroes on account of race—the union in its work referral practices and its membership admission practices, and the EJAC in its selection of apprentices.

As to post-Act practices, the District Judge also found:

THE MEMBERSHIP FINDINGS

"The Government contends that as the union has practiced discrimination in the past administration of its apprenticeship classes that all Negroes over apprenticeship age are forever excluded from membership and that continued refusal to directly admit

Negroes over apprenticeship age violates Section 703 (c)(1) of the Act, 42 U.S.C. § 2000e-2(c). This argument is not correct, for it ignores the realities of the possibility of Negroes over apprenticeship age achieving membership through the referral system . . .

"While the fact that there has been no such test for several years is true, the failure to administer such a test cannot be considered discriminatory. It was not until the summer of 1967 that any substantial numbers of Negroes began to work under the jurisdiction of Local 38 through the referral system."

A new union leadership was elected in June of 1967, virtually on the eve of the trial. As to giving the test the District Judge held that:

"[T]hey determined to do so at a time when there were enough Negroes qualified to take the test under the existing standards so as to make it meaningful as a practical matter . . .

"It would thus appear that the initial failure to administer the test for Group One [resident journeymen] status subsequent to July 2, 1965 could not have affected the employment opportunities of Negroes and that the fact that the test has not yet been given is not racially motivated. While the fact that there were not sufficient Negroes working under the auspices of Local 38 to make the granting of the examination meaningful may itself involve racial discrimination, that is not the question here under consideration and it will be dealt with in considering the referral system.

"It is therefore this Court's conclusion that the plaintiff has failed to prove a pattern and practice of racial discrimination on the part of Local 38 by its . . . failure to date to administer the test for Group One which will open the door for an application to journeyman membership.

"Were it not for the fact that the defendant union is pressing to go forward with the Group One test,

the Court would issue an order requiring it to do so, for a continuing failure to administer such test would constitute a discriminatory practice remediable under Title VII. . . ."

THE WORK REFERRAL FINDINGS

"Although the 2-B [unskilled whites] category was formally discontinued as of June 1, 1965 plaintiff introduced documentary evidence indicating that thereafter Local 38 continued to refer men for work who did not have the requisite experience. Exhibits were introduced containing referrals of both white members of other unions and white nonunion members whose referral application, it is contended, did not reflect one year's experience as electricians. The Court has examined these exhibits, and finds that contained therein are referrals of unqualified whites, although not all the documentation therein supports the plaintiff's contention.

"William Hirsch, who was a union business agent up to July, 1967, admitted that if there was a demand for help that he could not meet with qualified electricians he would refer unexperienced persons. It appears that men so referred would be used to perform manual labor jobs.

. . .

"There is evidence in the record to indicate that Local 38 had engaged in discrimination in the administration of the referral system. The record further indicates, however, that any discriminatory practices which existed in this area came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 as a result of an election held in June, 1967. The two principal officials who assumed office were Richard Acton as Business Manager and John Gilbert Steele as President. Mr. Acton replaced all the incumbent business agents, who work in the administration of the referral system, with his own appointees."

THE APPRENTICESHIP FINDINGS

"The Government's attack upon the current selection procedures is not based on an attempt to demonstrate discrimination in actual apprentice selection, as was done for 1965 and 1966, but is rather predicated on the proposition that the procedures are essentially subjective and discretionary, and are inherently discriminatory. It is argued that:

"'It is of particular importance, then, in the light of the EJAC's long history of racial discrimination to ensure that the current selection system is objective and reviewable. For in these circumstances a discretionary system constitutes an unlawful vehicle for further discrimination.'

. . .

"In summary, the plaintiff has shown a generally discriminatory approach to apprenticeship by EJAC prior to July 2, 1965. Although the evidence for the years 1965 and 1966 would support a strong suspicion of racial discrimination, the plaintiff has failed to prove an actual pattern and practice of discrimination continuing beyond July 2, 1965. Consequently, the plaintiff is not entitled to a finding in its favor, with a mandatory order directed to EJAC, on this subject matter.

". . . It is the Court's conclusion that their positive actions in moving this union forward in the field of racial integration reflect their own personal convictions and do not represent matters of expediency to develop a record for the courts."

Dealing with the government's charge that Negro applicants were discriminated against in the oral portion of the examination given by defendant EJAC, the District Court held:

"The major evidentiary deficiency in this record is the absence of evidence of the relationship between the oral scores of the Negro applicants in 1965 and 1966 and the oral scores of a significant number of

white candidates who performed in a truly comparable manner on the non-oral tests. Although the Court has the total oral and non-oral scores for all applicants in the August, 1965 and August, 1966 classes, the detailed scoring is only available as to the Negro candidates and the successful white candidates, and as between those two groups there is not a sufficient identity of performance on the non-oral side of the tests, when considered in their details rather than as total grade, to make a meaningful comparison. If this record contained evidence that a significant number of whites received substantially higher oral grades than did the Negro applicants despite the fact that the two groups performed in a reasonably comparable fashion on the non-oral tests, that would provide evidence of discrimination. The Court has found no such proof in the record."

APPELLATE ISSUES.

Appellee took no cross-appeal and appellant presents only two issues:

"(1) Whether the district court erred in ruling that, despite their traditional practices of denying membership and referral to Negroes because of their race, defendants may now follow referral and admissions practices which, although racially neutral on their face, perpetuate the effects of past discrimination and result in the present and future denial of employment opportunities to Negroes which are equal to their similarly qualified white contemporaries.

"(2) Whether, having found that defendants engaged in unlawful racially discriminatory employment practices up to the eve of this lawsuit the district court erred in failing to grant any specific relief, and in refusing to retain jurisdiction and to require the submission of reports and maintenance of records to insure compliance with the law."

We answer both of these questions in the affirmative.

In addition to relying strongly upon the now overruled District Court opinion in the *Sheet Metal Workers* case, *supra*, the District Judge relied heavily upon a provision in the Civil Rights Act of 1964:

> "(j) *Preferential treatment not to be granted on account of existing number or percentage imbalance*
>
> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area." 42 U.S.C. § 2000e-2(j) (1964).

We believe this section prohibits interpreting the statute to require "preferential treatment" solely because of an imbalance in racial employment existing at the effective date of the Act. But we also believe that its prohibition must be read in conjunction with the fundamental purposes of the statute (*see* 42 U.S.C. § 2000e-2(c)

(1964) above) and in conjunction with the section providing for affirmative relief:

> "§ 2000e-6. **Civil actions by the Attorney General.**
>
> "(a) **Complaint.**
>
> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) *requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.*" 42 U.S.C. § 2000e-6 (1964). (Emphasis added.)

When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices.

Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964. This could result from adoption of devices such as a limitation of new apprentices to relatives of the all-white membership of a union, *Int'l Ass'n of Heat & Frost Insulators & Asbestos Wkrs., Local 53 v. Vogler*, 407 F.2d

1047 (5th Cir. 1969), or limitation of membership to persons who had previous work experience under union contract, while such experience was racially limited to whites, *United Papermakers & Paperworkers, Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969), or administration of qualification examinations which had no objective standards and which produced unexplained discriminatory results. *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123 (8th Cir. 1969).

While the District Judge did not in theory reject all affirmative relief, he did reject it in this case. In addition, he squarely refused to require Local 38 to take appropriate steps to make known to eligible Negroes in the Cleveland area that its recognized pre-Act discriminatory practices in membership, in work referral, and in admittance to apprentice training had ended.

Dealing with a record containing findings of pre-Act discrimination only, the Eighth Circuit said in the *Sheet Metal Workers* case:

> "It is equally clear that Local 36 did not permit Negroes to take a journeyman's examination, to join the Local, or to use its hiring hall prior to 1967. The Local built the discriminatory practices into its employment referral system by negotiating a new system of referring persons for employment by priority groups, and by giving preference to those who had an opportunity to gain experience under the collective bargaining agreement and in the industry prior to its effective date.
>
> "In our view, neither Local can be permitted to continue to operate its employment referral systems without change. Both plans effectively operate to deprive qualified Negroes of an equal opportunity for employment as journeymen electricians or as sheet metal workers. Because the plans carry forward the effects of former discriminatory practices, they result

in present and future discrimination and are violative of Title VII of the Act.[15]

"We recognize that each of the cases cited in n. 15 to support our position can be distinguished on the ground that in each case, a number of known members of a minority group had been discriminated against after the passage of the Civil Rights Act. Here, we do not have such evidence, but we do not believe that it is necessary. The record does show that qualified Negro tradesmen had been and continued to be residents of the area. It further showed that they were acutely aware of the Locals' policies toward minority groups. It is also clear that they knew that even if they were permitted to use the referral system and become members of the union, they would have to work for at least a year before they could move into a priority group which would assure them reasonably full employment. In the light of this knowledge, it is unreasonable to expect that any Negro

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"[15] *Local 189, United Papermakers and Paperworkers, AFL-CIO, United Papermakers and Paperworkers, AFL-CIO, CLC*; and *Crown Zellerbach Corporation v. United States of America*, 416 F.2d 980 (5th Cir. 1969), *aff'g. United States by Clark v. Local 189, United Papermakers and Paperworkers*, 282 F. Supp. 39 (D.C. La. 1968); *Local 53 of Int. Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), *aff'g Vogler v. McCarty, Inc.*, 294 F. Supp. 368 (E.D. La. 1968); *N.L.R.B. v. Local 269, Internat'l Bro. of Elec. Wkrs.*, 357 F.2d 51 (3rd Cir. 1966); *Dobbins v. Local 212, International Bro. of Elec. Wkrs*, 292 F. Supp. 413 (S.D. Ohio 1968); *Quarles v. Philip Morris Incorporated*; 279 F. Supp. 505 (E.D. Va. 1968). *Contra, Griggs v. Duke Power Company*, 292 F. Supp. 243 (M.D.N.C. 1968); *U.S. v. International Brotherhood of Electrical Workers, Local 39*, 71 L.R.R.M. 2087 (1969); *U.S. v. International Brotherhood of Electrical Workers, Local 38*, 70 L.R.R.M. 3019 (1969). The *Dobbins* Court, at 445, said:

"'A policy of giving priority in work referral to persons who have experience under the Local's Collective Bargaining Agreement is discriminatory when competent [Negroes] have previously been denied the opportunity to work under the referral agreement by reason of their race . . . .'"

tradesman working for a Negro contractor or a non-construction white employer would seek to use the referral systems or to join either Local."

United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123, 131-32 (8th Cir. 1969).

It is important, however, to note that the record of this case shows two years of discriminatory practices *after* the effective date of the Act.

As of the date of the complaint in this case, defendant union had 1,318 members, of whom two were Negroes. On that date it had 255 apprentices, of whom three were Negroes. And in the preceding year it had referred 3,487 persons for work in the electrical trades through its hiring hall, of whom only two were Negroes.

The District Judge found that the evidence supported the government's claims of discriminatory practices extending up to and beyond the date of the filing of this complaint.

While he limited specific findings of discrimination to the union's referral practices, these practices controlled absolutely who got jobs in the organized electrical trades in the Cleveland area. The record discloses that 75% of all electrical construction work in the Cleveland area was done under Local 38's contract.

These facts (and the above-stated difference of interpretation of 2000e-2(j)) require vacation of the pro forma judgment entered by the District Judge and remand for consideration of appropriate affirmative relief. We feel that this view represents the great weight of authority among the federal courts which have as yet dealt with this type of problem. *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123 (8th Cir. 1969); *United Papermakers & Paperworkers, Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Hayes Int'l*

Corp., 415 F.2d 1038 (5th Cir. 1969); *Int'l Ass'n of Heat & Frost Insulators & Asbestos Wkrs., Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Dobbins v. IBEW, Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968). *See also Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970).

We do not, however, wish to ignore the other factor which played an important—perhaps decisive—role in the District Judge's decision concerning affirmative relief in this case.

As we have indicated, after this suit was filed by the Attorney General, but before trial, a new administration was elected to office in Local 38. The District Judge found that the new officers favor voluntary compliance with the Civil Rights Act of 1964 and have taken steps to bring past discriminatory practices to an end. These facts, however, do not in our opinion warrant the District Court's refusal to retain jurisdiction of this case or its refusal of affirmative relief. The record of compliance is very brief—particularly as compared to the long record of discrimination—and even that record has been written under the impact of this litigation. *Cypress v. Newport News Gen'l & Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967). Assuming, as the District Judge plainly did, and as we do, that the new leadership is in utter good faith, it has no mean task ahead in eliminating ingrained discriminatory practices of past decades. In many respects a more specific court order, plus retention of jurisdiction, might serve to support the stated objectives of the new administration of Local 38. And, in any event, such relief is authorized by the Act and called for in this record. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969).

We do not at this point seek to write the order or even to specify an outline for it. The District Court may find

appropriate the forms of relief granted in the *Sheet Metal Workers* case, *supra*, and in the *Local 189* case, *supra*. *See also Dobbins v. IBEW, Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968). Or if the District Judge's hopes (and ours) prove well-founded, it may be possible for these previously adversary parties to agree upon and stipulate to the measures needed to achieve defendants' full compliance with the Civil Rights Act of 1964.

The judgment of the District Court is vacated and this case is reversed and remanded for further proceedings consistent with this opinion.

APPENDIX E.

JUDGMENT OF THE COURT OF APPEALS.

(Filed June 19, 1970.)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

No. 19,658.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38 AND ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendants-Appellees.

Before: PHILLIPS, *Chief Judge,*

EDWARDS and PECK, *Circuit Judges.*

JUDGMENT.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case is reversed and remanded for further proceedings consistent with the opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

APPPENDIX F.

LOCAL 38'S EXHIBIT AAA (IN PART).

(919)

DEFENDANTS' EXHIBIT NO. AAA.

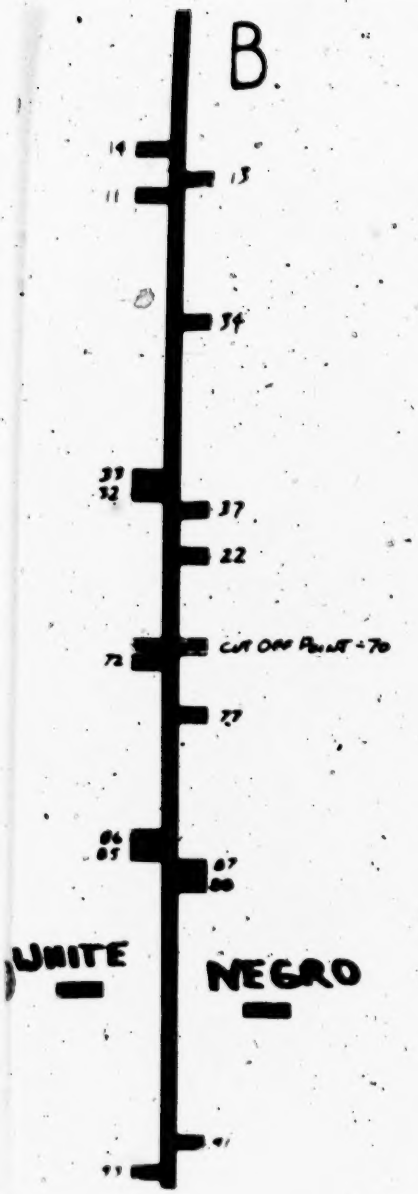
ANALYSIS FOR A PATTERN OR PRACTICE OF DISCRIMINATION

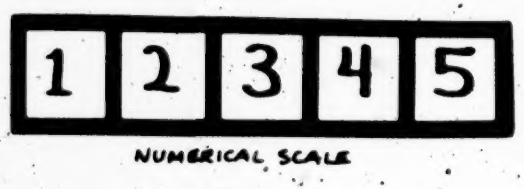
* * * * *

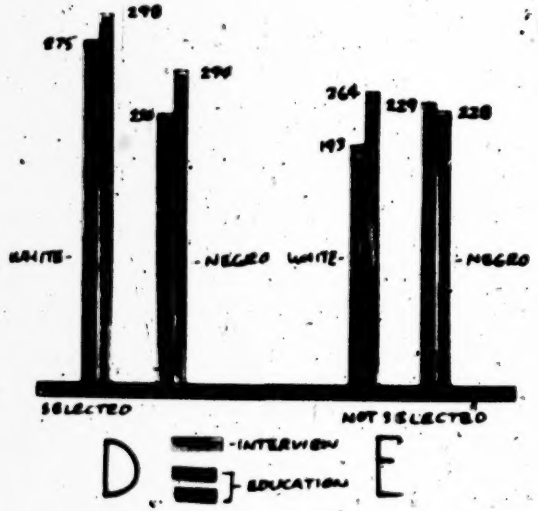
Printer's Note: Boldface figures in parentheses throughout the text of this exhibit indicate record page numbers. The photographic chart following this page is page 920 of the Record.

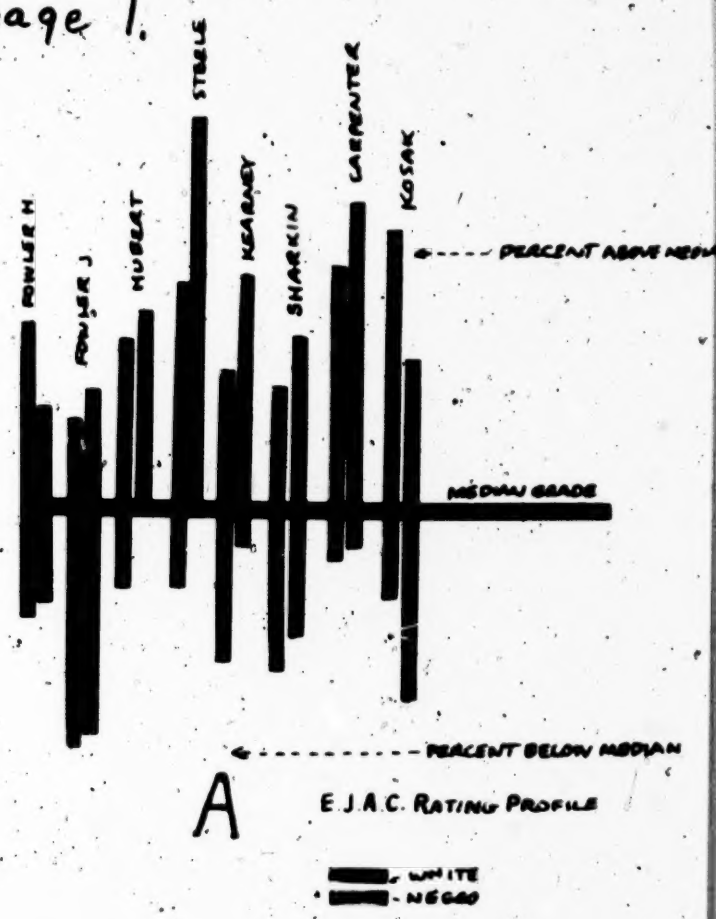
EXHIBIT AAA page 1.

CHART #1 1967









(921)

Item # 1

REVIEW FOR PATTERN OR PRACTICE OF DISCRIMINATION AGAINST NEGROES BY INDIVIDUAL EJAC MEMBER.

The problem of determining whether or not an interviewer is dishonest and deliberately discriminates against Negroes in grading is a very simple one. The Procedure is as follows:

Prepare work sheets to show how each interviewer normally grades within the point spread of grades on each applicant.

A separate work sheet should be prepared for the grading of whites and Negroes. See Work Sheets [PPS 5 through 26]

Because there are six interviewers, there could be six different grades, the median being half-way between the third and fourth level of grading.

Since there is only a small percentage of the time that at least two interviewers do not give the applicant the same grade, there will be very few grades at the sixth level. For the purpose of reviewing the grading done by the Cleveland EJAC, the median grade level is defined as the third grade level, descending from the high grade.

The highest and second highest grades are combined to give a percentage of times that each interviewer gave grades which were (922) higher than the median grade given. The lower three grade levels are combined to give a percentage of times that each interviewer gave grades which were lower than the median grade given.

The chart of final grades was prepared for 1967 based on interviews where Negroes were interviewed.

The dates of the interviews included were: 8/30/67,

9/7/67, 9/11 and 9/12/67, 9/13/67, 9/13 and 9/14/67. See Work Sheet |PP 21 thru 26|.

The results of the analysis of the work sheets produced the tablulation on page 4.

* * * * *

(946)

Item # 2.

A review of the entire group of EJAC interviewers in 1967 for pattern or practice of discrimination against Negroes.

STEP I. *The selection of a valid sample of applicants to be reviewed.* (See Chart No. 1-B)

A. The base of this sample was Plaintiff's Exhibit 21; A, B, C, in order to limit the necessary new documents.

B. Negroes in the Group classed as "Negroes Selected" are all the Negroes selected. (See Chart No. 1-B)

1. EASTER, Darrell Application No. 405—Rank 13.
2. BUTLER, David Application No. 363—Rank 22.
3. REID, Douglas Application No. 385—Rank 34.
4. JORDAN, Craig Application No. 328—Rank 37.

C. Negroes in the Group classed as "Negroes Not Selected." This Group is comprised of the four (4) highest ranked Negroes who were not selected. This makes a numerically equal Group to those selected for comparison.

1. RUCKER, Harold Application No. 485—Rank 77.
2. WHITE, McCray Application No. 341—Rank 87.
3. DENNIS, Harold Application No. 351—Rank 83.

(947)

4. WRIGHT, John R. Application No. 223—Rank 91.

D. Whites in the Group classed as "Whites Selected."

An ideal sample would include those whites ranked one (1) place higher or one (1) place lower than the Negroes in the "Negroes Selected" Group.

These men were not always included in Exhibit 21.

The selection of men for this Group was made from those available as follows:

1. LEE, Richard Application No. 396—Rank 11.
2. SINCLAIR, Timothy Application No. 498—Rank 14.
3. O'REILLY, Gerald Application No. 428—Rank 32.
4. DIEHL, James Application No. 221—Rank 33.

E. Whites in the Group classed as "Whites Not Selected."

No whites who were not selected were included in Exhibit 21. Therefore, this selection was made to provide a comparable Group.

1. RENFRO, John Application No. 387—Rank 72.
2. HORT, Daniel Application No. 199—Rank 85.
3. TRAVIS, Michael Application No. 269—Rank 86.
4. BOEHNLEIN, Richard J. Application No. 420—Rank 93.

STEP II. *Examination of all "Apprenticeship Application Rating Forms" to develop a combined rating for each of the four (4) Groups in the following categories:* (See |page 38|)

(948)

1. Educational Factors
   a. Mathematics Rating
   b. Science Rating
   c. Education Rating

2. Interview Factors
   a. Interest
   b. Attitude
   c. Personal Traits

A. A numerical scale was used to provide a means of averaging ratings given by all interviewers and to arrive at a combined rating for all applicants in each Group. (See Chart No. 1-C)

1. The numberical scale chosen was as follows: Each rating box on the form was given a number from 1 to 5 from left to right, i.e., lowest rating to highest rating.

2. Each applicant in each Group was given a combined rating based upon all interviewers' rating. (See Work Sheet Nos. |See pps 39 thru 50|)

When there were less than six (6) interviewers present, a correction factor equal to the average rating in each factor was added to give an equivalent rating.

(949)

3. A total combined rating was calculated for each Group by adding the individual combined ratings.

B. The results of this examination are as follows:

1. Whites Selected (See Work Sheets |pps 39 thru 40|)
   Educational Factors 275 (See # 1 Chart *D* Blue).
   Interview Factors 298 (See # 1 Chart *D* Red)
2. Negroes Selected (See Work Sheets |43 thru 44|)
   Educational Factors 230 (See # 1 Chart *D* Green)
   Interview Factors 294 (See # 1 Chart *D* Red)

3. Whites Not Selected (See Work Sheets [pp 46 thru 47])
   Educational Factors 193 (See # 1 Chart *E* Blue)
   Interview Factors 264 (See # 1 Chart *E* Red)
4. Negroes Not Selected (See Work Sheets [pp 49 thru 50.])
   Educational Factors 229 (See # 1 Chart *E* Green)
   Interview Factors 228 (See # 1 Chart *E* Red)

STEP III. *The combined ratings for each Group were used to determine their effect on selection.*

A. A Flow Diagram for all possible comparison was developed: (See following page)

* * * * *

(951)

COMPARISON DIAGRAM

* * * * *

B. The first comparison was made on Educational Factors alone.

1. The comparison in Educational Ratings between Whites Selected and Whites Not Selected Shows a difference of 82. (See # 1 Chart D-Blue and E-Blue)

2. The comparison in Educational Ratings between Negroes Selected and Negroes Not Selected shows a difference of only 1. (See # 1 Chart D-Green and E-Green)

3. The contrast on the first comparison called for an analysis of each transcript and the rating given for each applicant, to determine whether or not Negroes had been discriminated against. (See Work Sheet [pp. 41, 42, 45, 48, 51])

(a) Result of the analyses of transcripts: There **(952)** was no discrimination against Negroes in the ratings given on Educational Factors.

4. Further comparisons of Educational Factors were made, but provided no new information by cross-comparisons.

C. The second group of comparisons was made on Interview Factors alone.

1. The comparison in Interview Ratings between Whites Selected and Whites Not Selected shows a difference of 34. (See # 1 Chart D-Red, E-Red)

2. The comparison in Interview Ratings between Negroes Selected and Negroes Not Selected shows a difference of 77. (See # 1 Chart D-Red, E-Red)

3. Result of this comparison: The information from this comparison is not significant within itself, but will be used in the third comparison.

4. Other comparisons in Interview Ratings were made but provided no new information by other cross-comparisons.

D. The third group of comparisons was made using both Educational Factors and Interview Factors.

1. Combining both factors for Whites Selected shows:

Educational Rating 275 (See # 1 Chart D-Blue)

(953)

Interview Rating 298 (See #1 Chart D-Red)

(a) The Interview Rating is higher by a factor of 23.

2. Combining both factors for Negroes Selected shows:

Educational Rating 230 (See #1 Chart D-Green)

Interview Rating 294 (See #1 Chart D-Red).

(a) The Interview Rating is higher by a factor of 64.

3. The Interview Factor Ratings helped the Negro more than they did the whites when comparing the selected Groups. (See #1 Chart *D*)

E. A similar comparison of combined Education and Interview Factor Ratings was done for the Not Selected Groups with the following results: (See #1 Chart *E*)

1. Whites Not Selected (See #1 Chart *E*)
Education Rating 193—Red
Interview Rating 264—Blue

(a) The Interview Rating is higher by a factor of 71.

(954)

2. Negroes Not Selected (See #1 Chart *E*)
Education Rating 229—Green
Interview Rating 228—Red

(a) The Education Rating is higher by a factor of 1.

3. The Interview Factor did not help the Negro as much as it did the Whites when comparing the Not Selected Groups. (See #1 Chart *E*)

The whites would have rated lower without interview ratings. Negroes would have rated the same without interview ratings, but whites were not selected.

STEP IV. *Whether the analysis of information here indicates a Pattern or Practice of Discrimination against Negroes.*

A. What are the facts?

1. All applicants interviewed are qualified as to minimum requirements, therefore equal at start of Rating Procedure.

2. The study of all transcripts and education information conclusively showed no discrimination.

(a) A further study of transcripts shows the key to the high Interview Rating given the Negroes Selected as compared to the somewhat lower Interview Rating given the Negroes **(955)** Not Selected. (See Work Sheets [pp. 45 & 51])

(1) Negroes Selected (See Work Sheet [p. 45])

All four (4) of these men had sufficient Mathematical background; one had a very good background in Science.

All graduated in the second quarter of their class.

All had taken shop courses, Mechanical Drawing, and three took courses in Electricity and/or Electronics.

(2) Negroes Not-Selected (See Work Sheet [p. 5])

All four (4) of these men had sufficient Mathematical background and sufficient Science background.

Two graduated in the third quarter of their class. The class rank of two cannot be determined.

Only one had taken Mechanical Drawing, none had taken any Electrical subjects.

B. The Selected Negroes had demonstrated past interest in Electrical subjects.

All had demonstrated mechanical interest in the shop courses. Since they got credit for the class, we can assume that they can perform mechanical work.

They would have a knowledge of tools and blueprints. These factors must influence the Interview Factors.

C. The Not Selected Negroes had no such background.

1. Based upon the in-depth study of transcripts, there was no discrimination against Negroes Not Selected on a basis of lower Interview Ratings.

STEP V. *Conclusions.*.

A. No pattern or practice was shown to indicate discrimination against Negroes.

B. If Interview Factors had been limited to ten (10) percent or even fifty (50) percent weight in the final grading, the Negroes Selected in Cleveland for the Class of 1967 would have ranked lower and some probably would not have been selected.

C. This is a Reviewable Procedure.

D. The National Plan "Yellow Book" is Reviewable.

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 698.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38
and
ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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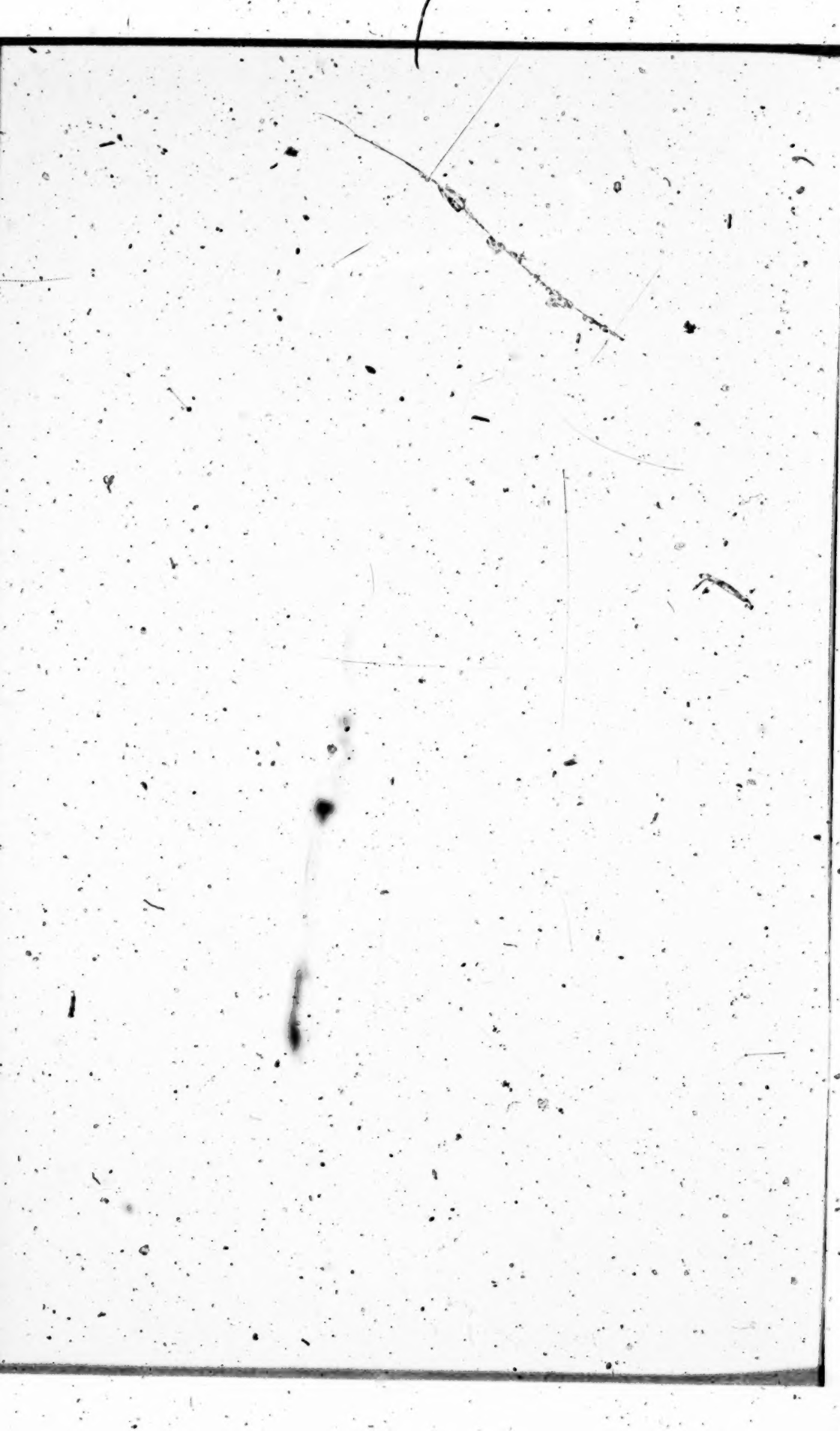

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38
and
ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in this proceeding on June 19, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet reported.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, entered March 21, 1969, and the supplemental decision of the District Court entered as of the same date are not printed in the federal reporter; the former is printed in 70 LRRM 3019; all three opinions with the order of the Court of Appeals are printed in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED.

Whether in a Title VII proceeding a Court of Appeals may reverse the District Court's judgment without any showing that its findings of fact were "clearly erroneous" and may vacate the District Court's decree without any showing that it constituted an "abuse of discretion" and remand "for consideration of appropriate affirmative relief," when such consideration has been given by the District Court and such affirmative relief found unnecessary.

STATUTES INVOLVED.

The pertinent provisions of Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. Sec. 2000(e)-2000(e)15 are set forth in the Appendix.

STATEMENT OF THE CASE.

The Court of Appeals accepted *en toto* the issues as framed by the Department of Justice as follows (App. 82).

"Appellee took no cross appeal and appellant presents only two issues:

> "(1) Whether the district court erred in ruling that, despite their traditional practices of denying membership and referral to Negroes because of their race, defendants may now follow referral and admissions practices which, although racially neutral on their face, perpetuate the effects of past discrimination and result in the present and future denial of employment opportunities to Negroes which are equal to their similarly qualified white contemporaries.

"(2) Whether having found that defendants engaged in unlawful racially discriminatory employment practices up to the eve of this lawsuit, the district court erred in failing to grant any specific relief, and in refusing to retain jurisdiction and to require the submission of reports and maintenance of records to insure compliance with the law.

"We answer both of these questions in the affirmative."

By accepting the statement of (1) above as a *fact*, the Court of Appeals overruled the District Court's studied and detailed findings of fact that the petitioners (then defendants) referral and admission practices did *not* perpetuate the effects of past discrimination and did *not* result in denial of employment opportunities.[1] And the Court of Appeals did this without any showing that the District Court's findings of fact were clearly erroneous.

By answering (2) above in the affirmative, the Court of Appeals made no attempt to show the denial of specific

---

[1] The District Court's specific findings were (App. 41):

"Taking all the post-Act evidence into consideration, the Court is of the opinion that the plaintiff's proposal regarding waiver of the collective bargaining agreement's experience requirements goes far beyond the limits that are necessary to alleviate the effects of past discrimination. The legal predicate for that proposal by the Government is that a referral program, which, though neutral on its face, continues the effects of prior discrimination must be considered as presently discriminatory. *Dobbins vs. Local 212, supra.*

"The deficiency in that proposition is that it is not relevant to the record in this case. The effects of past discrimination has rather effectively been dissipated by the policies of the present union leadership. Each of the Negroes who were the subject of discrimination has advanced within the referral system to the point where the effects of the prior practice no longer affects his employment opportunities. As to other Negro electricians as to whom specific discrimination has not been shown, the union's present referral policies, coupled with actual economic conditions in the home building industry, make priority within the referral system an abstract consideration in relation to an individual's ability to obtain employment."

relief was an abuse of discretion, while the District Court did retain jurisdiction specifically in part and wholly through equity's general powers. Further, the Court of Appeals remanded "'for consideration of appropriate affirmative relief.'" This consideration had been given as shown by the District Court's extensive findings of fact, and that its judgment was based in a large part on its findings of credibility of the union officials who eliminated all discriminatory practices and which credibility and good faith findings the Court of Appeals upheld![2]

The complaint in the District Court alleged discrimination in violation of the Act in four areas: (1) that Local 38 refused to admit Negroes to membership in the union; (2) that Local 38 refused to consider Negroes for employment through the referral system on the same basis as white applicants; (3) that Local 38 refused to enter into a collective bargaining agreement with Negro electrical contractors on the same terms and conditions offered to white electrical contractors; and (4) that as to the defendant, Electrical Joint Apprenticeship Committee (EJAC), which is composed of an equal number of persons appointed by Local 38 and by NECA, the National Electrical Contractors Association, the bargaining agency representing electrical contractors in the Cleveland area, the allegations were that it has pursued a policy and practice of discrimination against Negro applicants to enter into the apprenticeship program because of race.

We will discuss these in order.

(1) **Journeyman membership.** The District Court found that Local 38 had refused to accept anyone, white or black, into direct membership as distinguished from

---

[2] The Court of Appeals said (App. 88): "Assuming, as the District Judge plainly did, and *as we do*, that the new leadership is in utter good faith, * * *." (Emphasis added.)

membership through the apprenticeship system, since 1952, except for three Negroes who were granted direct membership in 1957. Therefore, the Court felt that there was no discrimination against Negroes in refusing them direct membership while all whites were being similarly refused membership.

Since, however, both Group I in the referral system and membership in the union required passing an "IBEW Journeyman Wireman's Examination" and since the court found that there had not been any such examinations given, except once to some sixteen whites in 1959, all of whom flunked, it held (App. 25):

> "While the fact that there has been no such test for several years is true, the failure to administer such a test cannot be considered discriminatory. It was not until the summer of 1967 that any substantial numbers of Negroes began to work under the jurisdiction of Local 38 through the referral system. The record reflects that at that time Mr. Richard Acton, the newly elected Business Manager of Local 38, had discussions with Mr. Richardson, and also with individual Negroes applying for work indicating to them that there was the possibility of achieving union membership through the referral system. Mr. Acton further testified that he also discussed with Local 38's newly elected president, Mr. John G. Steele, the giving of the required test, and they determined to do so at a time when there were enough Negroes qualified to take the test under the existing standards, so as to make it meaningful as a practical matter. Thereafter the union leadership became so tied up in this litigation that they were unable to implement their determination to proceed with such a test. When the government became apprised of the fact that Local 38 intended to proceed with the test after this trial had been concluded, a motion was filed by the plaintiff [United States] to restrain the union

from going forward, which motion was granted with leave to the union to reapply to the Court for permission to give the test. Such a request is now pending before the Court.

"It would thus appear that the initial failure to administer the test for Group One status subsequent to July 2, 1965, could not have affected the employment opportunities of Negroes, and that the fact that the test has not yet been given is not racially motivated. While the fact that there were not sufficient Negroes working under the auspices of Local 38 to make the granting of the examination meaningful may itself involve racial discrimination, that is not the question here under consideration, and it will be dealt with in considering the referral system.

"It is, therefore, this Court's conclusion that the plaintiff has failed to prove a pattern and practice of racial discrimination on the part of Local 38 by its refusal to directly admit Negroes to journeyman membership, or its failure to date to administer the test for Group One which will open the door for an application to journeyman membership.

"Were it not for the fact that the defendant union is pressing to go forward with its Group One test, the Court would issue an order requiring it to do so, for a continuing failure to administer such test would constitute a discriminatory practice remedial under Title VII. At this juncture, no such order is necessary.

"In its proposals for relief under the heading of journeyman membership, the plaintiff suggested certain variations in the collective bargaining procedures relative to the Group One test, and the right of persons passing the exam to apply for journeyman membership in Local 38. Such alternative procedures constituted the entire relief sought by plaintiff in this area. The defendant Local 38, relative to the giving of the journeyman wireman's examination, and the government's proposals as to the appropriate conditions to be applied thereto, will be considered and resolved within the framework of that motion."

Thereafter, a hearing was held and a supplemental decision was written by the Court, in which it held as follows (App. 72):

> "Turning now to the Government's proposal pertinent to this matter, the Government in essence suggests a waiver of the experience under the collective bargaining agreement as a prerequisite for eligibility to take the examination, and that Negroes who pass the examination be admitted to union membership based thereon without the necessity of a vote of the membership.
>
> "As to the waiver of eligibilities requirement, the proof established that all Negroes who were the subject of specific discrimination regarding referral are now eligible to take the examination. There are in addition a substantial number of other Negroes presently eligible to take the examination who were not shown to have been discriminated against.
>
> "As to the direct admission to membership, the Court has previously found that plaintiff has failed to prove that the defendant has utilized general membership votes as a discriminatory device.
>
> "Based on the Court's findings on the merits herein, the Court does not believe that the action requested by the Government is either necessary or warranted. If it should hereafter develop that there appears to be a pattern or practice of discrimination with regard to admission of membership as applied to persons placed in Group I, that problem can be dealt with when it arises, and should not be anticipated at this time."

The District Court has thus specifically retained jurisdiction over the case in regard to membership.

The Court of Appeals did not rule that the District Court's finding in regard to membership was clearly erroneous, and the District Court's opinion as to the future has been sustained because all five blacks who have passed the

Group I test since the decree have been voted into membership in Local 38.

(2) **The referral procedure.** Local 38 has had in its collective bargaining agreement with contractors since 1958, a referral procedure whereby each electrical contractor notifies the union of his employment needs, and is referred electricians. The District Court explained (App. 27):

> "In order to become a part of the referral system an electrician must appear in person at the union hall to fill out a referral application showing his job qualifications. The referral system is divided into four priority groups, and the applicant is classified into one of the groups, according to his qualifications. Under the collective bargaining agreement, Local 38 is to maintain an out-of-work list of all referral applicants for whom work is not available and when there is a job available the men are to be referred from such list by group priority, or by date of application within groups. However, an applicant for referral must reconfirm his availability for employment after sixty days in order to retain his priority.
>
> "Prior to May 1, 1968, the requirements for placement in the four referral groups were as follows:
>
> Group I. Four years experience in the trade; pass an IBEW journeyman wireman's exam; one year's residence within the jurisdiction of Local 38; and four years experience under the collective bargaining agreement.
>
> Group II. Four years experience in the trade; pass an IBEW journeyman wireman's exam.
>
> Group III. Four years experience in the trade; one year's residence within the jurisdiction of Local 38; four years experience under the collective bargaining agreement.
>
> Group IV. Two years experience in the trade."

The Court went on to find that on May 1, 1968, Local 38 revised the standards for Groups I, III, and IV so as to broaden them. For Group I, the work experience requirement remained at four years, but only one year under the collective bargaining agreement was required. For Group III, the work experience requirement was reduced to two years in the trade and six months in the last three years under the agreement. Group IV was revised to require only one year's experience in the trade.

The Court found evidence of three individuals who were discriminated against through the referral system. Two of these occurred just a month before the new administration came into office, when two Negroes were told to come back in a couple of weeks instead of being referred to work. They came back and were immediately referred to work by the new officers. Another man had been denied referral before that by the prior administration, and he was also referred to work by the new administration. The Court said (App. 30):

> "There is evidence in the record to indicate that Local 38 had engaged in discrimination in the administration of the referral system. The record further indicates, however, that any discriminatory practices which existed in this area came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 as the result of an election held in June, 1967. The two principal officials who assumed office were Richard Acton as Business Manager and John Gilbert Steele as President. Mr. Acton replaced all the incumbent business agents who work in the administration of the referral system with his own appointees.
>
> "Plaintiff has alleged in its Brief and has suggested throughout the Government's presentation that any change in policy by the defendant union is a direct

outgrowth of the pendency of this litigation. The Government has noted that Mr. Acton and Mr. Steele, along with other persons who ran for union offices with them on various slates, had previously held union positions. The record these men had in the union's elected bodies was not such that would enable them to have a strong hand in formulating union policy. The Court was able to observe Mr. Acton and Mr. Steele as witnesses in this trial and evaluate their credibility. It is the Court's conclusion that their positive actions in moving this union forward in the field of racial integration reflect their own personal convictions, and do not represent matters of expediency to develop a record for the courts. While it may be true that the Government's investigation of Local 38 was a motivating force, and the filing of this action coming as it did virtually on the eve of their election brought home to the new officers the full realization of the depth of the problem confronting the union; that does not require the conclusion that the officers' response thereto was not in good faith."

The Court of Appeals without any showing that the finding was clearly erroneous differed with it and made its own findings based on mistakes and its own conclusions (App. 87) as our editorial inserts in brackets show:

"It is important, however, to note that the record of this case shows two years of discriminatory practices after the effective date of the Act."

[But the "2 years of discriminatory practices" were two instances of failure to refer by the defeated officers and one prior instance by the same officers and the new officers immediately referred all three to work.]

"As of the date of the complaint [1967] in this case, defendant union had 1,318 members, of whom two were Negroes: On that date it had 255 apprentices, of whom three were Negroes. And in the preceding year it had referred 3,487 persons for work in

the electrical trades through its hiring hall, of whom only two were Negroes."

|If statistics like these are decisive, the Department of Justice should be enjoined; in 1967 it was one of the worst discriminators in the government.[*]|

"The District Judge found that the evidence supported the government's claims of discriminatory practices extending up to and beyond the date of the filing of this complaint."

|The Court of Appeals is mistaken. The Complaint was issued August 8, 1967. The District Court found (App. 30): "The record further indicates, however, that any discriminatory practices which existed in this area (referral) came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 * * *"|

"While he limited specific findings of discrimination to the union's referral practices, these practices controlled absolutely who got jobs in the organized electrical trades in the Cleveland area. The record discloses that 75% of all electrical construction work in the Cleveland area was done under Local 38's contract."

|This is true but the three blacks discriminated against were referred to employment immediately by the new officers.|

"These facts (and the above-stated difference of interpretation of 2000(e)-2(j)) require vacation of the pro forma judgment entered by the District Judge and remand for consideration of appropriate affirmative relief."

"These facts" were far short of a showing of "clearly erroneous." This Court has held that a finding cannot be

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[*] In the Department of Justice in 1967 only 7.6% employees were black and these were congregated in G.S. 1 through 4, practically menial labor, while only 9/10 of one percent were in G.S. 12-18 the medium to high paid positions. (From the "Study of Minority Group Employment in the Federal Government, 1967" prepared by U.S. Civil Service Commission.)

set aside as "clearly erroneous merely because the appellate court might give the facts another construction, resolve the ambiguities differently and even find a more sinister cast to actions which the District Court deemed innocent," *U. S. v. National Association of Real Estate Boards,* 339 U.S. 485, and where evidence would support a conclusion either way, but where a trial court has decided to weigh it more heavily for defendants, such a choice between two permissible views of the weight of the evidence is not "clearly erroneous," *U. S. v. Yellow Cab Co.*, 338 U.S. 338.

Further the Court of Appeals remand for the District Court's "consideration of appropriate affirmative relief" is not a finding that the trial court had abused its discretion in formulating the relief and overlooks the real consideration the trial court had given affirmative relief as to referral procedure wherein discrimination had been found. The District Court found (App. 41):

> "At the present time there are over forty Negro electricians working on referral groups from Local 38. Approximately one-third of that group, including every individual as to whom post-Act discrimination was shown has been working under the referral system for a sufficient length of time to qualify for the proposed Group I journeyman wireman's exam."
>
> "Taking all the post-Act evidence into consideration, the Court is of the opinion that the plaintiff's proposal regarding waiver of the collective bargaining agreement's experience requirements goes far beyond the limits that are necessary to alleviate the effects of past discrimination. The legal predicate for that proposal by the Government is that a referral program, which, though neutral on its face, continues the effects of prior discrimination must be considered as presently discriminatory. *Dobbins vs. Local 212, supra.*"

"The deficiency in that proposition is that it is not relevant to the record in this case. The effects of past discrimination has rather effectively been dissipated by the policies of the present union leadership. Each of the Negroes who were the subject of discrimination has advanced within the referral system to the point where the effects of the prior practice no longer affects his employment opportunities. As to other Negro electricians as to whom specific discrimination has not been shown, the union's present referral policies, coupled with actual economic conditions in the home building industry, make priority within the referral system an abstract consideration in relation to an individual's ability to obtain employment."

"Finally, while admitting that Local 38 has since July, 1967, referred a number of Negroes for employment, the Government contends that the union continues to follow policies which, although not discriminatory on their face, result in discrimination against Negroes because it perpetuates the effects of previous exclusion of Negroes. The evidence on this record supports the finding that since July, 1967, when the new union leadership took office, there has not been a single instance of true intentional discrimination in the administration of the referral system. Mr. Acton testified that he has referred every qualified Negro electrician who applied for work. And the evidence has produced no evidence to rebut that testimony. There is other evidence in the record that the present union leadership has actively participated in programs to further integration of the craft unions, and to stimulate minority group interest in the electrical trade."

The District Court went on to find that the Associate Director of Community Relations of Case Western Reserve University in Cleveland, himself a Negro, testified how Local 38 had in the past been a "problem" union in racial relations, but no longer has such a reputation (App. 40).

The Court then found (App. 41):

"It appears to the Court that the only way in which the defendant union could improve its specific record with regard to Negro referral would be to solicit Negro electricians for employment, which the Civil Rights Act does not require or grant preferential treatment to Negro referral applicants, which the Civil Rights Act does not permit."

The Court further considered specific affirmative relief and ruled (App. 43):

"In conjunction with its proposal that certain of the collective bargaining conditions for referral be waived as to Negroes, the Government seeks an order that Local 38 shall establish formal procedures for the referral of persons with less than one year of electrical experience, and until such time as such procedures are formalized, Negro applicants of less than one year's experience as an electrician and who are over the apprenticeship age shall be referred in Group IV. This Court should not require the union to establish a referral classification not provided for by the collective bargaining agreement unless the record indicates that such action is necessary to overcome the effects of past discrimination. As the temporary 2-B classification which category was similar to the Group proposed by the Government was discontinued prior to July 2, 1965, this Court cannot grant any relief based on its former existence. While there is evidence that some whites without the requisite experience for referral were given employment after July 2, 1965, such practice was stopped by the present leadership. And the number of such referrals in relation to the total referrals during the relevant period is small. The Court does not believe that the potential discriminatory impact of that discontinued practice is significant or meaningful to warrant the far-reaching relief proposed by plaintiff. It appears to the Court that to grant the relief permitting referral of only

Negroes with no electrical experience would be to create a favored class in order to correct an existing imbalance, which is prohibited by 42 U.S.C. Section 2000(e)-2(j).

"The plaintiff has made other proposals regarding the relief herein. Certain of those are directed to a requirement that Local 38 strictly observe the collective bargaining agreement's conditions as to record keeping. There is no question that the union should comply with such requirements. Certain other proposals, however, would in effect make the United States the general supervisor of the collective bargaining process through which the referral program was formulated. The Court does not believe such an order is warranted in this case.

"It is the Court's conclusion that the only relief necessary at this time, based upon the entire record, is a general order enjoining the defendant union from discriminating in the operation of the referral system and requiring observance of the terms of the collective bargaining agreement of May 1, 1968."

Thus the District Court gave great consideration to affirmative relief *and granted it* to the extent in the best judgment of that Court it was necessary.

However, the Court of Appeals again differing with the District Court, but without a showing that it had abused its discretion in framing relief, held (App. 88):

"We do not, however, wish to ignore the other factor which played an important—perhaps decisive—role in the District Judge's decision concerning affirmative relief in this case.

"As we have indicated, after this suit was filed by the Attorney General, but before trial, a new administration was elected to office in Local 38. The District Judge found that the new officers favor voluntary compliance with the Civil Rights Act of 1964 and have taken steps to bring past discriminatory practices to an end. These facts, however, do not in our

opinion warrant the District Court's refusal to retain jurisdiction of this case or its refusal of affirmative relief. The record of compliance is very brief—particularly as compared to the long record of discrimination—and even that record has been written under the impact of this litigation. *Cypress v. Newport News Gen'l. & Nonsectarian Hosp. Ass'n.*, 375 F.2d 648 (4th Cir. 1967). Assuming as the District Judge plainly did, and as we do, that the new leadership is in utter good faith, it has no mean task ahead in eliminating ingrained discriminatory practices of past decades. In many respects a more specific court order, plus retention of jurisdiction, might serve to support the stated objectives of the new administration of Local 38. And, in any event, such relief is authorized by the Act and called for in this record. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969)."

The District Court has jurisdiction of this case as we show hereafter and it did consider and grant the relief it found needed. The Court of Appeals is merely differing in opinion—not finding an abuse of discretion.

(3) **Negro contractors.** The District Court held that the plaintiff had failed to prove any racial discrimination in Local 38's dealings with black contractors. (App. 22.) The Department of Justice made no complaint of this finding in its appeal to the Court of Appeals.

(4) **The apprenticeship program.** The Government alleged that there were specific cases of discrimination in the apprenticeship selection for the classes in the spring and fall of 1965 and 1966.[1]

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[1] The petitioner EJAC, incidentally, when it was advised by the Department of Justice of its allegations that thirteen persons were discriminated against in those selections, immediately offered all thirteen a position in the class of 1967. Three accepted, three were in the Armed Services, three declined, three failed to respond, and one could not be located (R. 760). One who declined the offer, in 1967, Tyrone Price, in 1970 came to EJAC and asked if he could now reconsider. He was advised he could and was admitted to the 1970 apprentice class.

However, when the Government presented evidence, it failed of proof; the Court's finding as to this alleged discrimination is as follows (App. 57):

> "Based on all the foregoing, it is the court's conclusion that the plaintiff has failed to carry the burden of proving that Local 38 EJAC engaged in an intentional pattern and practice of discrimination by the administration of the apprenticeship selection procedure in 1965 and 1966. The evidence raises some doubt and suspicions in that direction, but there are simply too many holes in the evidence for the Court to find other than that the plaintiff has established the possibility that Negroes were the subject of discrimination. It is the court's opinion that the Civil Rights Act requires a stronger showing than that before the Court may find that the plaintiff has proved its case."

The Court then found that the new leadership of Local 38 in 1967 adopted the so-called national plan (App. 57-58) which had been developed by the IBEW on a national basis, and which had been determined to be consistent with 29 CFR Part 30 by the Department of Labor. The Government claimed the plan was discriminatory, although it did not allege any specific cases of discrimination, but stated only that it was a non-objective and non-reviewable way of selection. Local 38, on the other hand, claimed that it was reviewable and demonstrated through defendant's Exhibit AAA (App. 91) as explained by its expert (R. 574-628), a way of testing the reviewability and showing whether or not each examiner was doing a non-discriminatory job. This exhibit is reproduced in the appendix without various charts and tables which were the work product of the expert.

The Court, after reviewing the evidence in detail held as follows (App. 62):

"There is no doubt that the national plan under which the EJAC is now operating has a substantial subjective element in it, and as such the label of 'discretionary' attached to it by the plaintiff is not totally unreasonable. To say, however, that a test is discretionary does not automatically mean it is discriminatory. A degree of discretion is not, in and of itself a vice. It is the manner in which that discretion is exercised that is critical.

"There is testimony in this record by witnesses conversant with the problem that Negro youths in this geographic area as a group are among those persons referred to by sociologists as culturally deprived, although they do not constitute the entirety of that segment of the populace and can not be so categorized. As such, they are at a general disadvantage competing with suburban white youths on the basis of education and background. A testing procedure with a discretionary element can be used to penalize the culturally deprived for deficiencies which society has created, and thus further restrict their opportunities to join the mainstream of modern life. On the other hand, if such discretion is wisely exercised, one may acknowledge these realities of present urban conditions, and make allowances therefor, thereby narrowing the built-in differential between individuals coming from unequal environments. On this record there is no evidence that the Local 38 EJAC has taken advantage of the discretionary aspects of the national plan to practice racial discrimination."

The Court then concluded:

"In summary, the plaintiff has shown a generally discriminatory approach to apprenticeship by EJAC prior to July 2, 1965. Although the evidence for the years 1965 and 1966 would support a strong suspicion of racial discrimination, the plaintiff has failed to prove an actual pattern and practice of discrimination, continuing beyond July 2, 1965. Consequently,

the plaintiff is not entitled to a finding in its favor with a mandatory order directed to EJAC, on this subject matter."

The Court then went on, however, to make suggestions for improving the national plan, all of which, with one exception, recording the 30 or 40 sessions of the interviewing board, which was considered too cumbersome, were adopted by EJAC.

Despite all the above findings and the extensive supporting evidence, the Court of Appeals ignored them and said that it recognized that the District Judge "did not in theory reject all affirmative relief, he did reject it in this case." However, the District Court had issued its injunction as set forth above enjoining the union from discriminating in the operation and administration of the referral system and from denying equal employment opportunities to all persons with regard to the referral system, and also requiring strict adherence to the collective bargaining agreement provisions relating to the referral system. The order also provided retention of jurisdiction, over the motion regarding the journeymen wiremen's examination as shown above, and later the Court issued a supplementary decision in regard thereto. Actually the District Court, we believe has retained jurisdiction of the entire case, because any time either party could move to ask that the decree be changed or modified. As a matter of fact, the Department of Justice, in August, 1970, filed a request for production of documents under Rule 34 of Federal Rules of Civil Procedure, so the Attorney General presumes, as we do, that the court has retained jurisdiction of the case in all respects. This is in line with decisions of this Court. In *United States vs. United Shoe Machinery Corporation*, 391 U.S 244 (1968), it stated clearly and positively that a decree can always be

reopened. It pointed out that in the *United States vs. Swift & Company*, 286 U.S. 106, it had not limited the court below in granting relief long after the case apparently was closed and the court said that in *Swift*:

> "The lower court granted a measure of relief and the United States appealed. This Court reversed. It emphasized the power of a court of equity to modify an injunction in adaptation to changing conditions though it was entered by consent."

Then it went on to say:

> "*Swift* teaches that a decree may be changed upon an appropriate showing and it holds that it may NOT be changed in the interests of the defendants, if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices), have not been fully achieved."

It held:

> "Decision as to the government's petition to modify the decree in the present case must be based upon the specific facts and circumstances that are presented."

Then the Court said:

> "The trial court is charged with inescapable responsibility to achieve this objective [to deny the fruits of statutory violations to defendants]. Although it may, if circumstances warrant, accept a formula for achieving the result by means less drastic than immediate dissolution or divestiture. The decree in the present case was carefully devised within the limits of this principle. Measures short of divestiture were prescribed with provisions for review and possible revision after ten years * * *. If the decree had not contained paragraph 18—if it had been silent as to the time for submitting reports and if necessary, petitions for modification—and if after ten years it

were shown that the decree had not achieved the adequate relief to which the Government is entitled in a Section 2 case, it would have been the duty of the court to modify the decree to assure complete extirpation of the illegal monopoly. The court's power to do this is clear * * *."

Unquestionably the district court has retained jurisdiction herein and yet one of the reasons stated by the Court of Appeals for overturning the district court's decree was that it had not retained jurisdiction.

The Court of Appeals did not rule that any of the above findings of the district court were clearly erroneous or that the district court abused its discretion in framing the injunction. It merely disagreed with the reasoning of the district court and held that affirmative relief is mandatory regardless of the district court's findings of fact and rulings on credibility and findings of a good faith break from the past by Local 38's new officers.

REASONS FOR GRANTING THE WRIT.

I. An Important Question of Federal Law.

The decision below presents an important question of federal law, which has not been and should be settled by this Court. Unless Title VII, without any such provision within it, is to be considered beyond the "clearly erroneous" rule and to take away from district courts their discretion in formulating decrees based on their findings of fact, then petitioners urge review, independently of whether or not we prevail on the merits, as vital to the effective utilization of Title VII under the circumstances relating to the power of district courts in these cases.

Rule 52 of the *Rules of Civil Procedure* provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the oppor-

tunity of the trial court to judge the credibility of the witnesses."

A decision made rule, just as specific, is that a wide range of discretion rests in the district court in framing relief in a decree, and abuse of discretion must be found for an appellate court to set aside such decree.

The Court of Appeals in this decision ignored both of these applicable rules.

II. In Conflict with the Decision of Another Court of Appeals.

The decision is in direct conflict with a decision of the Fifth Circuit Court of Appeals in *U. S. vs. Atkins*, 323 F.2d 733 (1963) decided under the Civil Rights Act of 1960. There an action had been brought by the United States under an earlier Civil Rights Act, 42 U.S.C. 1971, against a State and a County Board of Registrars in regard to alleged racially discriminatory acts and practices in registration of voters. The District Court denied the requested injunctive relief but issued an injunction compelling the Board to allow rejected applicants to apply for re-registration. The United States appealed. The Court of Appeals held that notwithstanding that findings to the effect that current Board of Registrars had not engaged in racially discriminatory practices in registering voters were not clearly erroneous, it was an abuse of discretion to refuse an injunction enjoining members of Board of Registrars and their successors from engaging in any acts or practice intended to result, or the probable effect of which would be to result, in racial discrimination in registration of voters, where circumstances required the conclusion that there was a cognizable danger that there would be some discrimination without injunctive relief.

The Court of Appeals said as to "clearly erroneous:"

"The district court found as a fact that the present Board of Registrars has not engaged in racially discriminatory acts and practices, has not pursued a full-time pattern or practice of discrimination, and has not been more stringent in its requirements to Negroes than to whites. The court found that the present Board 'has made every effort to comply with the letter and the spirit of the law, and has taken the necessary steps to eliminate the discrimination which was the basis of the suit against its predecessor Board.' The United States attacks this finding and asserts that the new practices are applied so as to be merely a more sophisticated form of discrimination than that practiced in the past.

This Court may not set aside findings of fact of the district court unless they are 'clearly erroneous.' Fed. R. Civ. P. 52(a). A study of the evidence in this case does not convince us that the district court was clearly in error in finding that the present Board is not engaged in racial discrimination."

And as to "abuse of discretion," the Court said:

"The real question, then, is whether it was an abuse of discretion by the trial court to refuse to grant the injunction. We believe that it was. In *United States v. W. T. Grant Co., supra,* the Court also held that along with a court's power to hear the case, the power to grant injunctive relief survives discontinuance of the illegal conduct, since the purpose of an injunction is to prevent future violations. But the moving party must satisfy the court that relief is needed. There must exist some cognizable danger of recurrent violation, more than a mere possibility; and a strong showing of abuse of discretion must be made to reverse the Chancellor's decision. The Court said the following factors should be considered: (1) the bona fides of the expressed intent to comply, (2) the

effectiveness of the discontinuance, and (3) in some cases, the character of the past violations."

The Court of Appeals then found that there was an abuse of discretion and that a general injunction against discrimination should have been ordered by the district court and the case was remanded.

Since *U. S. vs. Atkins,* the Fifth Circuit has consistently applied the two rules in civil rights cases, *U. S. vs. Edwards,* 333 F.2d 575 (1964); *U. S. vs. Ramsey,* 353 F.2d 650 (1965); *U. S. vs. Leflore County,* 371 F.2d 368 (1967).

The instant decision is in direct conflict with the Fifth Circuit decision.

III. In Conflict with Applicable Decisions of this Court in Analogous Situations.

In other civil rights cases the importance of the district court has been upheld by this Court. For instance in the landmark case of *Brown vs. Board of Education of Topeka,* 349 U.S. 753 (1955), this Court held further argument on the question of relief, and invited the parties and the Attorney General of the United States to participate in the argument. It then went on to hold that:

"Full implementation of these constitutional principles (in regard to desegrating schools) may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

Then it said:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."

In another civil rights case, *Green vs. County School Board of New Kent County, Virginia*, 291 U.S. 430 (1968), the Court more recently said:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state imposed segregation. It is incumbent upon the district court to weigh the claim in light of the facts at hand and in light of any alternatives that may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, the availability to the board of other, more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation is completely removed."

Quite similar to civil rights and Title VII cases are antitrust cases, but despite direct appeal to the Supreme Court provided by that statute and the tremendous problems arising thereunder, there has been no erosion of the "clearly erroneous" statutory rule nor the "abuse of discretion" court made rule. For instance, in *Besser Manufacturing Company vs. United States*, 343 U.S. 444, this Court set forth that:

> "Appellants assert that the factual conclusions of the trial court are erroneous. Only recently we reiterated the narrow scope of review with respect to issues of fact in antitrust cases. *United States vs. Oregon State Medical Society*, 343 U.S. 326. In this case we think it enough to say that the conclusions of the trial judge that appellant conspired to restrain and monopolize interstate commerce in concrete block-making machinery and that they monopolized and attempted to monopolize that industry are overwhelmingly supported by the evidence. Not the slightest ground appears for concluding that the trial judge's findings were 'clearly erroneous.' Rule 52(a) Fed. Rules Civ. Proc. 28 U.S.C. 14."

This Court then said regarding affirmative relief:

> "In framing relief in antitrust cases, a range of discretion rests with the trial judge. * * * We can find no abuse of discretion here."

In *United States vs. E. I. DuPont DeNemours and Company*, 366 U.S. 316 (1961), also an antitrust suit, this Court said:

> "One principle has comprehensive application. It is that courts of equity as this Court advised the District Court in remanding the case to it to fashion the appropriate relief, 'are clothed with large discretion to model their judgment to fit the exigencies of the particular case.' 353 U.S. at pp. 607-608, 77 S. Ct.

at page 885. This is commonplace, but one of the compelling importance. To forget it is to forget equity's special function and historic significance. The transcendence of this doctrine derives from the recognition that without it the effort to dispense equal justice under law would all too often be frustrated. The landmark sentences of *Hecht Company vs. Bowles*, 321 U.S. 321, * * * express the principles that must guide the chancellor: 'we are dealing here with requirements of equity practice with a background of several hundred years of history. * * * The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for adjustment and reconciliation between the public interest and private needs as well as between conceding private claims. * * *"

This Court pointed out:

"The District Court was duty bound to exercise discretion—which means to weigh contending considerations and conflicting evidence as a matter of judgment—in framing a decree to meet the needs of the case. It could not escape exercising discretion—that is, exercising its judgment within an area of allowable choice—which this Court committed to it. Discretion precludes whimsy or caprice. Discretion means judicial discretion of a court of equity. When precedent or judicial tradition has established limitations on the chancellor's range of choice, he must respect them."

This Court further said:

"To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed

except for straying outside the permissible range of choice, i.e., for abuse of discretion. * * * In sustaining the judgment *Lorain Journal Company vs. United States*, 342 U. S. 143, * * * the court stated its standard for upholding the trial court's decree as simply that 'the decree is reasonably consistent with the requirements of the case and remains within the control of the court below.' * * * Certainly we ought not to reverse the carefully wrought results of a conscientious trial judge without a showing amounting almost to a demonstration that he exceeded the fair limits of judicial choice which this Court explicitly reposed in him."

This Court has been just as zealous in regard to the two rules when the district court had dismissed the case before it.

In *United States vs. Oregon State Medical Society*, 343 U.S. 326 (1952) there was an action for injunction to prevent and restrain violations of the antitrust act. The District Court dismissed the complaint, and the United States appealed directly to the Supreme Court, which held that the findings of the District Judge were not clearly erroneous. This Court stated:

"While Congress has provided direct appeal to this Court, it also has provided where an action is tried by a court without a jury 'findings of fact shall not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.' * * * There is no case more appropriate for the adherence of this rule than one in which the complaining party creates a vast record of accumulated evidence, as to long-past transactions, motives, and purposes, the effect of which depends largely upon credibility of witnesses."

It went on to say that:

"The sole function of an action for injunction is to forestall future violations."

The District Court had the occasion to consider the good faith or permanence of a changed attitude of the defendants, and the Supreme Court said:

> "But we find not the slightest reason to doubt the genuineness, good faith, or permanence of the changed attitude and strategy of these defendant-appellees which took place in 1941."

The same thing is, of course, true here where the Court of Appeals affirmed that the union officials in good faith ended all discriminatory practices. Similar also to the instant case was the finding of this Court in the *Oregon State Medical Society* case as follows:

> "Striking the events prior to 1941 out of the Government's case except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices. It would prolong this opinion beyond useful length to review evidentiary detail peculiar to this case."

This Court then found as follows:

> "We conclude that the Government has not clearly proved its charges. Certainly the Court's findings are not clearly erroneous. 'A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' * * * The Government's contentions have been plausibly and earnestly argued, but the record does not leave us with any 'definite and firm conviction that a mistake has been committed.'"

Further,

> "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature, 'face to face with living witnesses, the original trier of the facts holds a position of ad-

vantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * how can we say the judge is wrong? We never saw the witnesses * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' "

And this Court concluded:

"Affirmance is, of course, without prejudice to future suit if practices in conduct of the Oregon's Physician's Service or the county services, whether or not involved in the present action shall threaten or constitute violation of the antitrust law."

As we have pointed out heretofore that is the only remedy needed in the instant suit, if any is ever needed.

WHY NOT AFFIRMATIVE RELIEF?

The District Court enjoined any continuation of discriminatory practices in the referral system. And on the question of membership, if there is any discrimination occurring, the decree is specifically reopenable, and as shown above under general equity powers the entire decree is open, and thus most of what the Court of Appeals complained, that the District Court did not retain jurisdiction over the case, is not relevant.

The Court of Appeals also complained that the District Court had refused to require Local 38 to make known to Negroes the end of pre-Act discrimination (App. 85). But this was made known as the District Court specifically had found (App. 40):

"There is other evidence in the record that the present union leadership has actively participated in programs designed to further integration of the craft unions, and to stimulate minority group interest in the electrical trade."

And since then everything possible has been done to so notify blacks. Local 38's officers are speaking in black high schools and often on television and working with employment relations men in the colleges and high schools, stressing the opportunities for blacks in the electrical industry; participating in the "Outreach Program" conducted by the Workers Defense League which is federally funded for the purpose of obtaining employment for blacks in the building trades, and the Forest City Training Program also federally funded to rehabilitate and make employable the hard core black unemployed, and in every way showing that discrimination has ended since the taking of office by these men in the summer of 1967. They have affirmatively provided for employment of blacks, membership by blacks, placed blacks in the apprentice classes, signed contracts with black contractors. In the referral system every black who has asked for employment has been referred, and this means everyone sent by the Workers Defense League, all other such organizations, by Community Relations Officers, friends, etc. There are now 73 blacks on their way to eligibility in Group I upon passage of an exam and after the passing of which, membership is attained in the union.

Prior to June 30, 1970 thirty-eight had become eligible to take the examination; only eleven took it—five passed and are members of the union.[5] In the apprentice-

[5] Twenty-four more blacks were eligible for the last examination given June 30, 1970. Only seven took the exam and all failed. The Joint (Union and NECA) Examining Committee therefore declared the examination invalid and announced to the 24 that the *identical* examination would be repeated and those eligible would have an additional 30 days to study for it and that a black member of Local 38 would be on the committee to grade this examination. It is hoped this will not only find if a different examination or different study requirements are needed, but will also motivate more of those eligible to take the examination.

ship system, there are thirty black apprentices, nine percent of the total number of apprentices. So over one hundred blacks are now working in the union's jurisdiction.

This has all been accomplished by the union itself, not only by its eliminating discrimination, but by its affirmatively working closely with all black groups in Cleveland. Local 38 has become outstandingly known in Cleveland for its compliance with the law.[6]

The Court of Appeals was wrong in thinking Local 38 had not notified the black community of the end of its pre-Act discrimination. It has even been criticized by many other unions for such widespread activity in soliciting blacks. In spite of the criticism Local 38 leadership has continued to do its best to completely integrate this local.

Then why not accept affirmative relief? Why fight it?— Because it is unjust!

Why should leaders who have done nothing wrong be required to operate the union under the supervision of the Department of Justice? Why should they have to make reports monthly or quarterly or at any time to the Department of Justice? Why should the referral system be changed when no discrimination has been shown by these officers? Why should there have to be a separate referral

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[6] Typical is the following quotation from a columnist in the Cleveland Press (Norman Mlachak February 21, 1970):

"PRACTICING BROTHERHOOD . . . Chester J. Gray—he's the regional boss of the Equal Opportunity Commission—had high praise this week for the local and national leadership of the International Brotherhood of Electrical Workers. Gray called the IBEW "one of the great unions in this country" and praised it for its "magnificent thrust" toward ending discrimination within its ranks.

Local leaders of the IBEW are J. Gilbert Steele, president and Richard Acton, business manager. Both have won reelection to their offices by high margins after their attempts to integrate the local's ranks."

system for blacks? Particularly for ones without any experience. Why should the membership rules be changed when there has been no discrimination? Why should the apprenticeship selection be changed when there has been no discrimination? It is as if the Court of Appeals were saying, "Local 38's leaders have done nothing wrong. Its leadership is in good faith, but they must be under the domination of the Department of Justice." It is the same as requiring a healthy corporation to go into receivership. It is saying, "Well, why NOT have an injunction against you? You are a building trades union, you discriminated at some time or other (as others have, including the Department of Justice), and henceforth you will report to your parole officer regardless of the fact that you have a perfect record; regardless of the fact that you are in good faith, regardless of the fact that you are doing a tremendous job; regardless of the fact that you are the leaders in Cleveland among building trade unions in integration; regardless of the fact that you have never discriminated; regardless of the fact that you never intend to discriminate."

In other words, it doesn't matter that the Local 38 leaders have obeyed the law and done everything possible to abide by the law—they are to be on parole anyway. If their actions require a broad, all-inclusive injunction, then why bother with trials? Just enjoin all unions.

Further, it is widely known in the negro and white communities in which Local 38 operates that it has done everything possible to comply with this Act, and much, much more; if it is to be punished, what price compliance with the law? There are many labor organizations and employers who have NOT done everything possible, or anything possible, to comply with this law and who have, in fact, flaunted the law, and have not been punished, at

least as yet. Yet this local is to be punished? This failure of equality in the administration of the law will do more to harm its administration than anything else could possibly do. When innocent men are convicted and guilty men are acquitted or not tried, the law is dishonored.

Why should Local 38 not be free to continue its integration by itself to prove to the Cleveland community, black and white, that this one union, at least, can accept this law, obey it as it should be obeyed and be an example to all unions that voluntary compliance is possible. And almost everyone agrees that voluntary compliance is best.

And if Local 38 discriminates in the future, then the decree of the District Court can be opened and the matter handled as it should be when discrimination occurs.

CONCLUSION.

By setting aside the decree of the District Court in this case and in ruling that specific affirmative relief is mandatory, the Court of Appeals rendered the "clearly erroneous" and "abuse of discretion" rules inapplicable to Title VII cases, without authority in law or equity and in direct conflict with the decision of another Court of Appeals on the same matter. This is of major importance and in conflict with decisions of this Court in analogous situations.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

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No. 888

In the Supreme Court of the United States

OCTOBER TERM, 1970

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 38, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 698

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion (Pet. App. 10–69) and supplemental opinion (Pet. App. 70–73) of the district court are not officially reported. The opinion of the court of appeals (Pet. App. 74–89) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90) was entered on June 19, 1970. The petition for a writ of certiorari was filed on September 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

406-823—70

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 requires affirmative relief against current employment practices which perpetuate the effects of past racial discrimination.

STATUTES INVOLVED

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(c), provides in pertinent part:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; * * *

Section 703(d), 42 U.S.C. 2000e–2(d), provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program

established to provide apprenticeship or other training.

Section 706(g), 42 U.S.C. 2000e–5(g), provides in pertinent part:

> If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate * * *.

Section 707(a), 42 U.S.C. 2000e–6(a), provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern of practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

STATEMENT

This suit was brought by the United States against the petitioner union and the Electrical Joint Appren-

ticeship and Training Committee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et. seq.* The complaint alleged that the defendants were engaged in a pattern or practice of racial discrimination by excluding Negroes from participating in employment opportunities, including union membership, an apprenticeship program, a work referral system, and contractor affiliation.

The district court found that racial discrimination against Negroes had been practiced in referral, admissions, and apprenticeship selection prior to the effective date of the Act (Pet. App. 69; see, also, Pet. App. 63) and that overt discriminatory practices with respect to referral had continued until just before commencement of this action (Pet. App. 68); but it found no conscious discrimination in apprenticeship selection or membership after the effective date of the Act. It denied all relief with respect to admission to the union or the apprenticeship program and entered a general injunction against continuation of overt discriminatory practices in the referral system. The court specifically declined to order affirmative relief designed to alleviate the continuing effect of the past discriminatory practices (Pet. App. 15–16).

On appeal, the court of appeals reversed and remanded the case "for consideration of appropriate affirmative relief" (Pet. App. 87).

ARGUMENT

The court of appeals ruled simply that where a defendant follows employment practices which, although neutral on their face, result in continuation of the

effects of past racial discrimination, the district court is obligated under Title VII of the Civil Rights Act of 1964 to order affirmative relief which so far as feasible eliminates such discrimination. The decision of the court of appeals is clearly correct and is in accord with all of the appellate decisions under Title VII.

Petitioners contend that the court of appeals erred in reversing the judgment of the district court without holding that its findings were "clearly erroneous" or its decree was an "abuse of discretion." The basis of reversal was not disagreement with the district courts findings of fact, however. Nor is discretion involved. The court of appeals differed with the district court on a legal issue: whether Title VII requires affirmative relief in situations such as this.

In cases of racial discrimination this Court has held that:

> the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Louisiana v. *United States*, 380 U.S. 145, 154; see, *e.g.*, *Carter* v. *Jury Commission*, 396 U.S. 320, 340; *Green* v. *County School Board*, 391 U.S. 430, 438 n. 4. This principle, developed in constitutional cases, is, particularly in light of the statutory authorization of affirmative relief (Section 706(g), *supra* p. 3; see, also Section 707(a), *supra* p. 3), equally applicable to suits to secure the comprehensive rights to equal employment opportunities conferred by Congress in Title VII. In the context of enforcing Title VII, it requires

the entry of a specific, detailed decree which eliminates or reforms practices and procedures that perpetuate the effects of past discrimination. This rule, adopted by the court below, has been unanimously recognized in all the court of appeals decisions on point.[1] In view of the district court's findings of discrimination, the rule was properly applied by the court of appeals in this case.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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[1] See *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (C.A. 4), petition for a writ of certiorari on other grounds granted, 399 U.S. 926, No. 124, this Term; *United States* v. *Dillon Supply Co.*, 63 CCH Lab. Cas. ¶ 9477 (C.A. 4, July 8, 1970); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (C.A. 5), *certiorari denied*, 397 U.S. 919; *United States* v. *Hayes International Corp.*, 415 F.2d 1038 (C.A. 5); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (C.A. 8); *Jones* v. *Lee Way Motor Freight, Inc.*, No. 464–69 (C.A. 10, August 17, 1970).

[2] The decisions on which petitioners rely (Pet. 22–30) involve neither Title VII nor the issue of whether affirmative relief is required to correct employment practices which perpetuate the effects of past racial discrimination.

U.S. GOVERNMENT PRINTING OFFICE: 1970